

Corporate Criminal Liability for its Criminal Conduct

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การวิจัยในครั้งนี้ เป็นการวิจัยเกี่ยวข้องกับความรับผิดทางอาญาของนิติบุคคล โดยมุ่งเน้นไปที่การพิจารณาความรับผิดทางอาญาสำหรับนายจ้างที่เป็นนิติบุคคลโดยอาศัยเหตุจากการที่ลูกจ้างได้กระทำความผิดอาญาต่อบุคคลที่สาม ซึ่งเรียกว่า หลักความรับผิดในการกระทำความผิดของบุคคลอื่น

ความรับผิดทางอาญาของนิติบุคคลในฐานะนายจ้างนั้นจะเกิดขึ้นก็ต่อเมื่อมีการแสดงเจตนาโดยการกระทำของนิติบุคคลหรือผลสืบเนื่องมาจากเจตนาที่ก่อให้เกิดประโยชน์ต่อนิติบุคคล โดยเหตุที่นิติบุคคลตามกฎหมายเป็นบุคคลผู้ซึ่งไม่มีตัวตน การกระทำใดๆ จึงกระทำผ่านทางตัวแทนนิติบุคคล ดังนั้น การพิจารณาความผิดทางอาญาของนิติบุคคลจึงพิจารณาความผิดในหลักของการกระทำแทนของบุคคลอื่น ซึ่งอยู่ในสถานะตัวแทนของนิติบุคคลหรือบุคคลผู้ซึ่งมีหน้าที่กระทำหน้าที่หรือปฏิบัติการใดๆ แทนนิติบุคคล ในประเทศไทยบทบัญญัติของกฎหมายที่ให้อำนาจลงโทษทางอาญาแก่นิติบุคคลสำหรับกรณีดังกล่าวยังมีไม่เพียงพอ ทำให้นายจ้างไม่ตระหนักถึงความปลอดภัยในชีวิต ร่างกาย ทรัพย์สิน เสรีภาพ ฯลฯ ของบุคคลอื่นเท่าที่ควร

ด้วยเหตุนี้ จึงพบเห็นการกระทำความผิดทางอาญาของลูกจ้างซึ่งนายจ้างได้รับประโยชน์จากการกระทำ ความผิดนั้นอยู่เสมอ ในขณะที่ต่างประเทศมีมาตรการที่เข้มงวดในการลงโทษนายจ้างซึ่งเป็นนิติบุคคลกรณีเช่นนี้ด้วย

สำหรับการวิเคราะห์หาแนวทางที่เหมาะสมในการบัญญัติให้นายจ้างต้องรับผิดทางอาญากรณีลูกจ้างกระทำความผิดทางอาญาต่อบุคคลอื่นโดยเปรียบเทียบกับกฎหมายและคำพิพากษาของต่างประเทศ เพื่อให้ลูกจ้างซึ่งเป็นนิติบุคคลได้ตระหนักและเกิดความระมัดระวังในการประกอบกิจการ ดูแล ป้องกันและควบคุมถึงความประพฤติของลูกจ้างไม่ให้ไปกระทำความผิดและก่อให้เกิดความเสียหายแก่บุคคลอื่น ดังนั้นผู้วิจัยจึงได้เสนอมาตรการที่เหมาะสมเพื่อกำหนดบทบัญญัติทางอาญาโดยเฉพาะสำหรับนิติบุคคลต่างหากแยกจากบุคคลธรรมดาเพื่อแก้ไขปัญหาตามหลักนิติวิธีของระบบกฎหมายลายลักษณ์อักษร เพราะฉะนั้นโทษทางอาญาสำหรับนิติบุคคลจึงควรส่งผลกระทบต่อสิ่งที่เป็นนิติบุคคลล่วงหน้า โดยการแก้ไขโทษทางอาญาโดยเฉพาะสำหรับนิติบุคคล เช่น การยุบกิจการ การห้ามประกอบกิจการ การถูกควบคุมกิจการโดยเจ้าหน้าที่ของศาล การปิดกิจการ การห้ามประมุขงานทางราชการ การห้ามไม่ให้ระดมทุนจากประชาชน การห้ามส่งจ่ายเช็ค การปรับ การริบทรัพย์สิน การประกาศหรือแจกจ่ายคำพิพากษา จ่ายค่าทดแทนความเสียหายจากนิติบุคคลนั้น ๆ เพื่อนำบทลงโทษต่างๆมาบังคับใช้และบัญญัติเป็นหลักการทั่วไปประมวลกฎหมายอาญาอย่างชัดเจนในเรื่องความรับผิดทางอาญาของนิติบุคคล

สาขาวิชา กฎหมายธุรกิจ

ปีการศึกษา 2558

ลายมือชื่อนิสิต .....

ลายมือชื่อ อ.ที่ปรึกษาหลัก .....

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This research is concerned with criminal responsibility of legal entities focusing on employers who are legal entities where their employees commit criminal offenses to a third party which is called “vicarious liability”.

The criminal responsibility of the legal entity as an employer occurs when he or she shows intention towards the legal entity’s actions or consequences from the intention, resulting benefits to a legal entity. As the legal entity means a non-existent person, any actions are performed through its legal representatives. Thus, in considering whether the legal entity is responsible can determine from vicarious liability. The individual acts as a legal representative or a person whose duties are to perform any actions instead of the legal entity. In Thailand, legal provisions with criminal punishment authority upon legal entity for this case are not enough. As a result, the employers do not realize about safety of lives, bodies, belongings, freedom etc. of others as much as they should. As a consequence, some legal violations from employees lead to benefits for the employers. While, foreign countries have strict measures for the penalty of legal entity employers.

The proper approach for the enactment that employers must be responsible for criminal penalty of the employees is derived by comparison between foreign laws and court judgments in order to make the employer who is legal entity focusing on carefulness to operate a business, prevent or control their employees’ behaviors that would not perform any criminal violation or cause any damage to other party. Therefore, the researcher will suggest the appropriate measure for define the specific criminal provisions to the juristic person which separates from the natural person in order to solve many problems according to the juristic act in the civil law system. Hence, the criminal punishment for the juristic person should base on the factor that affects to the juristic person’s cherish things by adjusting criminal punishments of juristic person specifically such as dissolution, operation prohibition or revocation of licenses, detention, cessation, exclusion from public bidding, prohibition on public fundraising, prohibition on the uses of cheque or credit cards, fine, confiscation, victim notification or pay compensation by the juristic person. This punishments should be enforced and legislated to general principle in Penal Code obviously for the corporate criminal liability.

Field of Study: Business Law

Student's Signature .....

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## CONTENTS

	Page
THAI ABSTRACT .....	iv
ENGLISH ABSTRACT .....	v
ACKNOWLEDGEMENTS .....	vi
CONTENTS .....	vii
CHAPTER 1 INTRODUCTION .....	1
1.1 Historical Background and Significance of the Problems .....	1
1.2 Objectives of Study .....	28
1.3 Research Hypothesis .....	29
1.4 Scope of Research .....	29
1.5 Method of Study .....	29
1.6 Expected Benefits .....	30
1.7 Literature Reviews .....	30
1.8 Thesis Procedures .....	31
1.9 Terminology .....	33
CHAPTER 2 CONCEPT OF CORPORATE CRIMINAL LIABILITY .....	35
2.1 Introduction .....	35
2.2 Corporate Criminal Liability .....	36
2.2.1 Introduction of Corporate Criminal Liability .....	36
2.2.2 Common Characteristics of the Juristic Person .....	43
2.2.2.1 Civil liability .....	45
2.2.2.2 Criminal Liability .....	51
2.2.3 Statuses of Juristic Person .....	72

	Page
2.2.4 Criminal Liability for Employment in Thailand.....	83
2.2.4.1 Fair Restrictions of the Rights of Employers and Employees.....	87
2.2.4.2 The Issue regarding Confidentiality.....	87
2.2.4.3 Employment Contracts and the Scope of Restrictions.....	88
2.2.4.4 Confidentiality without Employment Contract and Unused Confidential Data.....	89
2.2.4.5 Restrictions of Employees' Rights: Fairness.....	90
2.2.4.6 The Issue regarding the Punishment of Corporation in Thailand..	92
2.3 Corporate Criminal Liability under Thai law.....	108
2.3.1 Corporate Criminal Liability and Juristic Person.....	108
2.3.1.1 Limitations of a Juristic Person.....	110
2.3.1.2 Objectives of a Juristic Person.....	110
2.3.1.3 Statuses of a Juristic Person.....	110
2.4 Principle of Vicarious Criminal Liability of Organizations in Thailand.....	122
CHAPTER 3 CONCEPT OF CORPORATE CRIMINAL LIABILITY UNDER FOREIGN LAWS	134
3.1 Introduction.....	134
3.2 Corporate Criminal Liability in the Common Law System.....	139
3.2.1 The United States of America.....	140
3.2.2 The United Kingdom.....	149
3.3 Corporate Criminal Liability in the Civil Law System.....	166
3.3.1 France.....	168
3.3.2 Japan.....	172
3.3.3 Germany.....	177

	Page
3.4 Common Punishments for Juristic Persons in Other Countries.....	180
3.4.1 Debate on Corporate Criminal Liability.....	202
3.4.1.1 Juristic Person has no deliberation of a criminal offence.....	202
3.4.1.2 Corporal punishment against in the Individual Person .....	203
3.4.1.3 Scope of authorization or objectives of the Juristic Person.....	204
3.4.1.4 No penalty for the Fictitious Juristic Person .....	205
3.4.2 Component of the Criminal Action per consideration on based ground under the Foreign countries.....	206
3.4.3 The Punishment measure against the Juristic Person under the Foreign Laws.....	207
3.5 Conclusion .....	211
CHAPTER 4 ANALYSIS OF CORPORATE CRIMINAL LIABILITY .....	215
4.1 The Analysis of the Law regarding to Corporate Criminal Liability .....	215
4.2 The Analysis of Specific Provisions for Corporate Criminal Liability .....	215
4.2.1 The application of Section 76 .....	216
4.2.2 Types of the established Juristic Person under the Liability for Wrongful Acts of Officials, B.E.2539 (1996).....	216
4.2.3 The actions that the corporation must be punished by the law.....	217
4.2.3.1 The original Japan Civil Code, Article 44as Thai draft Section 76217	
4.2.3.1.1 The Juristic Person’s Representative in term of Section 70 .....	218
4.2.3.1.2 The Juristic Person as temporarily appointed or provisional Juristic Person Representative under Section 73 or Section 75.....	221

4.2.3.1.3 The Authorized Person for general matters or a more specific issues assigned by the Representative as the Juristic Person's Representative .....	221
4.2.4 Critical evaluation the Corporate Criminal Liability that can be supported Criminal Liability in Thailand.....	223
4.2.4.1 Problem for application scope of tort liability of Juristic Person pursuant to Civil and Commercial Code.....	224
4.2.4.2 Juristic Person's liability should be the Liability pursuant to legislation in general part or liability in tort nature .....	225
4.2.4.3 Liability based on Section 76 is not the specific legislation of tort liability of Juristic Person.....	226
4.2.4.4 Element of tort liability of Juristic Person in damage occurred from the act of the Juristic Person's Representative or Authorized Officer on behalf of the Juristic Person.....	227
4.2.4.5 Application of the nature of Juristic Person's Liability.....	232
4.2.4.6 In the event of Juristic Person's Liability from the act of the Juristic Person's Representative or Authorized Officer on behalf of the Juristic Person.....	233
4.2.4.7 In the event of the Juristic Person's Liability from the act of the Juristic Person's Employee.....	238
4.2.4.8 Exercise of right of recourse pursuant to Section 76 in the academic opinion and the way of court judgment .....	242
4.2.4.9 Way of consideration on foreign law .....	245
4.2.4.10 Litigation problem for tort liability of the Juristic Person in Thailand .....	246

	Page
4.2.4.11 In the event of overt act of the Juristic Person's Representative or Authorized Officer on behalf of the Juristic Person.....	247
4.2.4.12 In the event of non-overt act of the Juristic Person's Representative or authorized officer on behalf of the Juristic Person.....	248
4.2.4.13 Matters of law in litigation to Juristic Person .....	250
4.2.4.14 Non-overt averment in the nature of allegation for tort liability of Juristic Person.....	251
4.2.4.15 Incomprehension on basic principle of tort liability in litigation for tort liability of the Juristic Person.....	252
4.2.4.16 Liability of the Juristic Person in the jurisprudence of Civil Law.....	255
4.2.4.16.1 Criminal Liability of Juristic Person .....	255
4.2.4.16.2 Tort liability of Juristic Person.....	257
4.2.4.16.3 Japan .....	257
4.3 The Analysis of the Corporate Criminal Liability in Thailand should be changed .....	260
4.3.1 Corporate Types.....	260
4.3.1.1 Thailand.....	260
4.3.1.2 The United States of America.....	263
4.3.1.3 The United Kingdom.....	267
4.3.1.4 France .....	271
4.3.1.5 Japan.....	274
4.3.1.5.1 The Criminal Offence .....	274

	Page
4.3.1.5.2 The Juristic Person's Liability in a Civil Offence of the infringement.....	274
4.3.1.6 Germany .....	279
4.3.1.7 Analysis the Foreign Law that can be solved the problems of Thai Law.....	281
4.3.2 Comparison Legal Principles and the Punishments for Corporate Criminal Liability both Common and Civil Law Systems .....	307
4.3.2.1 Thailand.....	307
4.3.2.2 The United States of America.....	334
4.3.2.3 The United Kingdom.....	336
4.3.2.4 France .....	350
4.3.2.5 Japan.....	363
4.3.2.6 Germany .....	364
4.3.2.7 Analysis the problems of Thai Legal Principles .....	368
4.3.2.8 The evaluation of the Foreign Law that can be used as a guideline for the Legal Principles and the Punishments for Corporate Criminal Liability in Thailand.....	381
4.4 Conclusion .....	435
CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS .....	443
5.1 Conclusions .....	443
5.2 Recommendations .....	450
REFERENCES .....	455
VITA.....	468

## CHAPTER 1

### INTRODUCTION

#### 1.1 Historical Background and Significance of the Problems

When we talk about a “person”, we generally mean a natural person. However, regarding to the organizations established whether as the company, partnership, association, foundation, governmental sector, etc., it will be the condition of person separated from the natural people (as human). This is called in legal term as “juristic person”, but any organization is an entity status as juristic person only depending on or by virtue of the Civil and Commercial Code and other laws (such as the royal act, emergency decree and royal decree) only<sup>1</sup>. Meyer et.al (2014)<sup>2</sup> explain the certain juristic person as mentioned in this article include limited partnership, partnership and limited company. The person acting on behalf of the juristic person is the person who expresses and does any actions on behalf of the juristic person.

In accordance with the juristic person mentioned has also above the persons acting under different ways it. That is, if is a partnership, its representative or the person acting on behalf of it is ‘managing partner’, if it is a company, its representative is ‘director’. Currently, there may be seen the companies having the individuals holding many positions such as ‘president, chief executive officer (CEO), chief operating officer (COO), vice president or managing director’, these positions are determined as elegant

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<sup>1</sup> Mattar M., "Corporate Criminal Liability: Article 10 the Convention against Transnational Organized Crime," Journal of International Affairs, 66(1) (2012): 107-122.

<sup>2</sup> B. Meyer, Van, R., Tessa, S., and Eelke, V., , "'Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks' ", 10(3) (2014): 37-54.

features in image varying in each organization. Nevertheless, in legal terms (according to being registered by the Department of Commerce), is only a managing partner (in case of a partnership) and director (in case of a company)<sup>3</sup>. The liability that will say as follows is the personal liability, that is, if it is possible in civil term, it means that the representative acting on behalf of the juristic person has to be personally liable to act itself such as it must compensate the damages itself or be liable as the court has made decision itself. The civil liability of the representative on behalf of the juristic person that is noticeable includes the liability according to the Corporate Company Act and the Civil and Commercial Act in relation to partnership and company<sup>4</sup>.

This aims to force the director of the company to perform its duty with honesty (Fiduciary Duty), and with caution (Duty of Care), and to prevent any conflicts of personal gain and the benefit of shareholders such as the prohibition for not letting the director performs any businesses of the company competing to the company, the prohibition for not letting the director perform any violation of the regulations of the company or violate the resolutions of the general meeting of shareholders, if any prohibition is made by that director, such director has to be liable for the payment of damages arising from the action<sup>5</sup>. According to, Konov (2011)<sup>6</sup> The person who has made guilty and let the others suffer or let the society be in trouble, he or she must deserve to be punished. For this reason, there will be the Criminal Code determining the punishment for such guilty, they include: The guilty relating to national security,

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<sup>3</sup> W. Hetzer, "Corruption as Business Practice? Corporate Criminal Liability in the European Union " European Journal of Crime, Criminal Law and Criminal Justice 15(3) (2007): 383-405.

<sup>4</sup> V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?," Harvard Law Review, , 109(7) (1996): 1447.

<sup>5</sup> W. Spurgeon, Allen, F., and Terence, P. , "Criminal Liability for Life Endangering Corporate Conduct " Journal of Criminal Law and Criminology, , 100(2) (2010): 400-433.

<sup>6</sup> J. Konov, "Piercing the Veil's Effect on Corporate Human Rights Violations & International Corporate Crime (Human Trafficking, Slavery, Etc)' <[Http://Mpra.Ub.Uni-Muenchen.De](http://Mpra.Ub.Uni-Muenchen.De)) ([Http://Mpra.Ub.Uni-Muenchen.De/35714/1/Mpra\\_Paper\\_35714.Pdf](http://Mpra.Ub.Uni-Muenchen.De/35714/1/Mpra_Paper_35714.Pdf)) "(2013).

administration or governance, justice, religion, public peace, faking/forging, trading, sex, life, body, liberty, reputation, property, etc. Regarding to, the guilty under the Criminal Code in terms of these different categories, if most of these are intended actions, it must be punished as identified in that sections unless in case of careless action and there is the law to be liable for such action. However, the person acting on behalf of the juristic person in addition to the Criminal Code, there are many other laws which have criminal penalties, they are: imprisonment and/or other legal penalty. Such laws include the Revenue Code as well as the royal decree and emergency act, which have many drafts or copies.

Currently, there are more than 80 copies of laws which have the penalty for the juristic person as the person acting on behalf of the juristic person and he or she acts guilty along with the juristic person. Such punishments as mentioned include both imprisonment and fine. In case of certain imprisonment, it has under prison from at least 1 month to 7 years longer<sup>7</sup>. The section that determines this punishment shall be mostly identified in the same way that “In case of the person get guilty and shall be punished under this act is the juristic person, managing director, manager or person that responsible for the implementation of such juristic person, shall be punished as provided for guilty unless he or she is proven that he or she is not connived to such guilty, or managed as appropriate to prevent such guilty.” in case of the guilty under such Penal Code, the one who act the one must be liable.

On the other hand, in such other laws mentioned above, the law identifies to punish those who act on behalf of the juristic person as well as in case of the juristic person is filed under its guilty, unless the person acting on behalf of the juristic person is able to prove himself or herself in terms of real actual purity. That is the law allows to open space letting the plaintiff files the lawsuit by combining the person acting on

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<sup>7</sup> Edwards, T. ‘Criminal Failure and The Chilling Effect: A Short History of the Bhopal Criminal Prosecutions.’ *Social Justice*, 41(2):53-79.

behalf of the juristic person to be the defendant<sup>8</sup>. For example, if the company that Mr. Somchai acting as the director is filed on advertising or labeling under false statements that cause misunderstanding of the essence in relation to the goods (The guilty in this case is an imprisonment not exceeding six months or a fine not exceeding five thousand Baht or both), as the director, he may be sued as the co-defendant, even such person will not act, only know but no any proper management is made for preventing such guilty, it is entitled to get the maximum sentence in decision as well<sup>9</sup>.

Generally, for the criminal prosecution the plaintiff has duty or obligation to prove that the defendant is guilty as charged, but if the person acting on behalf of the juristic person was gathered and accused as the defendant, the burden of proofing will be back to your responsibility to prove that you are purified and does not agree with such mistaken action<sup>10</sup>. But, there are some laws determined that to let hold both the juristic person and the manager or the representative of such juristic person are the same ones, such as the Drug Act, B.E. 2510 (1967)<sup>11</sup>, which the representative of juristic person will not be claimed that no responsibility for the incorrect action under the law. But, what it is still the problem is that the level of criminal penalty of the juristic person is still unjustified. Because of, in general, the criminal liability of the juristic person under the Criminal Code. The originally arguing that it whether the juristic person will be liable for criminal or not due to the criminal law is not clearly defined<sup>12</sup>.

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<sup>8</sup> L. Verrydt, "The Quest for International Criminal Liability with Regard to Corporations([Http://Scriptiebank.Be](http://Scriptiebank.Be)) ([Http://Scriptiebank.Be/Sites/Default/Files/Webform/Scriptie.Pdf](http://Scriptiebank.Be/Sites/Default/Files/Webform/Scriptie.Pdf)) "(2012).

<sup>9</sup> E. Sheley, "Perceptual Harm and the Corporate Criminal," University of Cincinnati Law Review, , 81(1) (2013): 225-268.

<sup>10</sup> Verrydt, L., "The Quest for International Criminal Liability with Regard to Corporations([Http://Scriptiebank.Be](http://Scriptiebank.Be)) ([Http://Scriptiebank.Be/Sites/Default/Files/Webform/Scriptie.Pdf](http://Scriptiebank.Be/Sites/Default/Files/Webform/Scriptie.Pdf)) ".

<sup>11</sup> "Drug Act, B.E. 2510 (1967) (Thailaws.Com) ([Http://Thailaws.Com/Law/T\\_Laws/Tlaw0071\\_1.Pdf](http://Thailaws.Com/Law/T_Laws/Tlaw0071_1.Pdf)) ".

<sup>12</sup> *Ibid.*

At the same time, Doyle (2013)<sup>13</sup> stated that “It is true that there are some crimes which, in their nature, it cannot be committed by corporations. But, there is a large class of offenses ... wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes, we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not, so many offenses might go unpunished and acts be committed in violation of law whereas in the present case, the statute requires all people, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.” Therefore, the corporation be held liable for the wrongful act done by the representative.

The Criminal Code of Thailand just only identifies the status of the guilty person as “anyone” in which the term “anyone” may only refer to natural person , or it may refer to natural person or juristic person. But, if it is overall considered of many legal provisions in the Penal Code both the provision using the consideration for the guilty and in a part of punishment, it is seen those legal provisions shall likely to be targeted only to the guilty person as the natural person, the juristic person may not be liable under the Criminal Code. This is due to some guilty bases on consideration, the juristic person may not be the guilty person at all such as the guilt based on the intended murdering and so on<sup>14</sup>.

In addition, in the subject of punishment identified in the Penal Code, if it is used for punishing the guilty person as the juristic person, it is indicated that it is proper to the juristic person due to the status of the juristic person does not allow to open space for executed punishment, imprisonment or detention<sup>15</sup>.

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<sup>13</sup> C. Doyle, "Corporate Criminal Liability: An Overview of Federal Law " 2013), pp. 1-29.

<sup>14</sup> S.S. Beale, "A Response to the Critics of Corporate Criminal Liability," American Criminal Law Review, 46(2009): 1481-1505.

<sup>15</sup> A.A. Robinson, "Corporate Culture as a Basic for the Criminal Liability of Corporations "(the United Nations Special representative of the Secretary General for Business and Human Rights, 2008).

Moreover, if it shall really punish the juristic person, it ought not to use the punishment rate equal to the guilty person being as the ordinary person. Thus, it contributes to the issues of discussion that the guilt caused by the carelessness or abuse of the juristic person to the person as the representative or subject of any actions performed on behalf of the juristic person. It shall get more the outcome or get more the punishment than the ordinary person due to the outcome of caused by the juristic person is affecting more than the outcome of the ordinary person such as the statements of Supreme Court, Decision No. 3446/2537, Sor Co., Ltd., the first defendant, Mr. Vor, the managing director, the second defendant, this first defendant was aimed to buy and sell the gas tank, gas equipment and chemicals, etc., the second defendant was responsible for the administration of the first defendant. On the date of occurring, the employees of the two defendants drove the gas lorry for supplying those to the customers under careless behaviors. This causes the lorry falling out, letting the gas tanks peel out, blowing up and firing. This caused the deaths and serious injuries to the people as well as damages of a number of properties. The Supreme Court ruled that “Despite the accident of this case, a part caused by the carelessness of the employee who was the driver of such accidental gas lorry but it was certainly seen that the outcome of this accident was partly caused by the actions of the first defendant, (Sor Co., Ltd.) as well”<sup>16</sup>.

At the same time, this was due to the first defendant did not bring the lorry to get the certification from the Department of Public Works and the Ministry of Industry on the standard of industry products under the ministerial regulation issued under the Revolutionary Party Decree No. 28, B.E. 2514 (1971), Article 3<sup>17</sup>, by without installing

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<sup>16</sup> Analyzed from Supreme Court, Decision No. 3446/2537.

<sup>17</sup> The Revolutionary Party Decree No. 28, B.E. 2514 (1971), Article 3 stated

For hereto the Interior Minister is authorized to issue the ministerial ordinance to prescribe details on

- (1) The criteria, procedure and conditions(s) to the application for license; licensing; license form; license/license substitution, fee (to an amount of not more than 100 Baht for one license); license showing; license term and the license renewal
- (2) The filling content, containing procedure and containing/storage venue
- (3) The features of each vessel to contain gas including the vessel's safety device thereto

the safety valves for preventing the accident in case of gas leaking ...“under carelessness without carefulness of the two defendants who did not control and care for, it was not followed by the law aiming to protect the public safety, it was the careless action without caution which the persons in status as the two defendants should have the visualization and behaviors ....”. The Supreme Court condemned the two defendants under Criminal Code, B.E. 2499 (1956), Section 291<sup>18</sup>, provided the punishment for the first defendant, 20,000 baht of fine, and the second defendant provided the imprisonment for a period of two years and a fine of 20,000 baht. But, for the penalty to imprisonment, let await the punishment for a period of two years under Criminal Code, B.E. 2499 (1956), Section 56<sup>19</sup>.

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- (4) The criteria and procedure for the testing and examining of the containing vessel
  - (5) The labeling to gas vessels
  - (6) The Officer in Charge's and Inspector's power and duty and format of the Inspector's card

The item (1) – (5) above shall be effective after 60 days from the date they enter the Royal Gazette.

Revolutionary Party Decree No.28, B.E. 2514 (1971) (thailaw.com)

([http://thailaws.com/law/t\\_laws/tlaw18200.pdf](http://thailaws.com/law/t_laws/tlaw18200.pdf)) accessed 4 November 2013.

<sup>18</sup> Thailand Criminal Code, B.E. 2499 (1956), Section 291 Whoever, doing the act by negligence and that act causing the other person to death, shall be imprisoned not out of ten years or fined not out of twenty thousand Baht.

<sup>19</sup> Thailand Criminal Code, B.E. 2499 (1956), Section 56 Whoever commits offence of imprisonment, and in such case, the Court will imprison not exceeding three years, if it does not appear that such person has been imprisoned before, or it appears that one has been imprisoned before, but it is punishment for offence committed by negligence or petty offence, when the Court has taken into consideration of sex, age, past record, religion, behavior, intelligence, education, health, mind-condition, temperament, occupation and envelopment of such person or the fined person's offence condition or other extenuating circumstance, it deems advisable, the Court will trial that such person has an offence but suspension of the determination of punishment or designates the punishment but the suspension of the in friction of punishment and then one is released for giving the time to such person reforming oneself within the period designated by the Court, but it must be not out of five year as from the date of the Court has passed a judgment and it will be designated by the condition for controlling such person's behavior or not.

Regarding the conditions for controlling the behavior of the offender, the Court may determine one or more conditions as follows:

1. To report himself to the official specified by the court from time to time so that the official may make inquiries, give advice, assistance or admonition on the behavior and carrying on occupation, or arrange the activity to be done for the social service or the public benefit, as the official and offender think fit;
2. To be trained or to carry on occupation substantially;
3. To refrain from going into the society or from any behavior which may lead to the commission of the similar offence again;
4. To take the offender to receive the assuagement and cure of the harmfully habit forming drugs, defective body or mind, or the other illness at the place and the period of time as determined by the Court;

With relation to consideration of the criminal offence by the legal entity involved with the intended and misconduct criminal offence, it is able to note that the concept of the punishment for the doer as the legal entity is still argued in term of whether the legal entity such as these companies will be criminally penalized or not. Because these companies do not have the real body, do not feel themselves, and how they will do the fault. It is considered that the law usually cannot make faults and get the criminal penalties<sup>20</sup>. Unless in case of the law obviously legislates or by implication that it lets the legal entity get the criminal offence of fault. The intent of the legal entity is expressed by the representative of the legal entity such as the committee. When the representative of the legal entity expresses the intent which is under the authority of the representative in term of business operation according to objectives of the legal entity. This intent shall be related to the legal entity and must be considered that it is the intent of the legal entity itself<sup>21</sup>.

Thus, the legal entity may have the intent as the criminal offence element and offence. The offender must have the intent including having it must get the criminal penalty according to the characteristics of fault opening for punish to the legal entity. This will be considered with relation to the characteristics of offence, action behavior and the authority of the representative of the legal entity assembling with the objective of the legal entity by case, which has several laws legislated that the committee will be

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5. The other conditions are determined by the Court, as it thinks fit, in order to rectify, resuscitate or protect the offender to be not commit the offence or not having the occasion for committing the offence again.

Regarding the conditions determined by the Court according to the foregoing paragraph, if, afterwards, it appears to the Court from the submission of the offender, the legal representative or guardian of such person, the Public Prosecutor or the official that the circumstances relating to the control of the behavior of the offender have changed, the Court may, if it thinks fit, modify, supplement or revoke any of the conditions, or may determine in addition any of the conditions as mentioned in the foregoing paragraph which is not yet determined.

<sup>20</sup> C. Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks," Northwestern Journal of International Human Rights, 6(2) (2008): 327-353.

<sup>21</sup> A.T. Bridgeford, "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism " Human Rights and Multinational Corporation, 18 (2003): 1009-1056.

also penalized in case of the company is offensive such as the Trade Competition Act, B.E. 2542 (1999), Section 54 has legislated in case of the offender is penalized under this Act is the legal entity, the managing director, managing partner or the person who is responsible for the implementation of the legal entity in that regard shall be also punished as legislated for the offence, unless it will be proved that action is made as the individual does not know or consent or the individual is managed appropriately to prevent for not making that offence<sup>22</sup>. Condominium Act, B.E. 2522 (1979), Section 72 legislates in case of the legal entity is penalized under this Act, it is considered that every committee or manager of the legal entity is penalized jointly with the legal entity, unless it will be proved that that action is made as the individual does not know or consent<sup>23</sup>. Factory Act, B.E. 2535 (1992), Section 63 legislates in case of company partnership or legal entity is penalized under this Act, any managing director or committee who is responsible for the action as offence shall be also punished as legislated for such offence unless it is proved that action is made as the individual does not know or consent<sup>24</sup>.

However, there are some faults which have different opinion whether the legal entity may be penalized or not such as the fault due to the careless action, some recommend that the legal entity may not have the fault due to careless action is not the intended action which desires to get the outcome or it may foresee. It may hardly be

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<sup>22</sup> Trade Competition Act, B.E. 2542 (1999), Section 54 In the case where the person who commits an offence punishable under the Act is a juristic person, then, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or her or she has already taken reasonable action for preventing the commission of such offence from occurring.

<sup>23</sup> Condominium Act, B.E. 2522 (1979), Section 72 A joint owner whoever carrying on a construction, decoration of, modification on, change in or addition to his unit in violation of Section 48(3) shall be liable for punishment of a fine not exceeding one hundred thousand Baht.

<sup>24</sup> Factory Act, B.E. 2535 (1992), Section 63 In case where a partnership, company or other juristic persons commit an offence under this Act, the directors, managers or any person responsible for such commission shall also be subject to the penalties provided for such offence unless it is proved that such offence has been committed without their knowledge or consent.

considered that it is the desire of the legal entity. As bringing the principle of careless offence to analyze together with the statements of Supreme Court, Decision No. 3446/2537, it shows that in such case the Supreme Court ruled which letting the legal entity is penalized for the offence caused by carelessness. It was the case of the explosion of overturned gas truck and fire burning at New Petchburi road. The prosecutor as the plaintiff sued the owner of gas truck at the scene as the first defendant and the managing director as the second defendant that they were jointly penalized under the Revolutionary Council Notification No. 28, B.E. 2514, and the fault based on careless action as the cause to let the other persons to death and be severely harmful to the body and as being the cause of fire and the other person's property to be damaged, and would probably harm the lives of others under Criminal Code, B.E. 2499 (1956), Section 225, 291, and 300<sup>25</sup>. The fact, the hearing was ended that the employee of the first defendant was driving a liquid petroleum gas (LPG) truck and then turned over causing the fire, the others to death and many injuries, and the other person's property to be much damaged and the truck driver died at the scene. The Supreme Court ruled in summary that the accidental LPG truck of the first defendant was not licensed and approved and tested by the Department of Public Works. The two gas tanks installed on the LPG truck was the tanks for installation on the ground, it could not be installed on the car, and it was not installed in accordance with the criteria set forth in the Note of Public Works Department.

Moreover, it did not install the flow control valves on the two LPG tanks, this was to violate the law. Although this accident was caused partly by the careless action

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<sup>25</sup> Thailand Criminal Code, B.E. 2499 (1956)

Section 225 Whoever, causing fire by negligence and causing the fling belonging to the other person to be damaged, or likely to cause damage to the life of the other person, shall be imprisoned not out of seven years or fined not out of fourteen thousand Baht, or both.

Section 291 Whoever, doing the act by negligence and that act causing the other person to death, shall be imprisoned not out of ten years or fined not out of twenty thousand Baht

Section 300 Whoever, committing the act by negligence and such act to cause the grievous bodily harm to the other person, shall be imprisoned three years or fined not out of six thousand Baht, or both.

of the employee as the first defendant, a driver who drove the overturned LPG truck. However, if the first defendant complied with the law on criteria and how to install the gas tanks for transportation and the characteristics with its internal elements of gas tanks, it will not happen like this. The action of the first defendant is the careless action without carefulness which he occupied as a trade and gas transportation career which is flammable and dangerous. According to the nature and circumstances of the merchant as the first defendant must take extra caution rather than the other careers because if it does perform extra caution, it will endanger the lives and properties of others not affiliated with as this case. The action of the first defendant was guilty in relation to prosecution. For the second defendant in addition to being the managing director of the first defendant was also the founder of the first defendant company and was the largest shareholder of the first defendant. The administration and authority of command of the entire administration remained solely with the second defendant, and it also meant that the second defendant was the managing partner of the managing partnership, the seller of the incident LPG truck to the first defendant. Responding the second defendant had authority to order inside the company on behalf of the first defendant, but he did not manage and correct the incident LPG truck as required by the law, he brought the truck back for use until causing this case. The action of the second defendant was also guilty in relation to prosecution. The observation of this case was able to consider from the Supreme Court ruling against the first defendant as the owner of LPG truck which was not prepared the truck in safety condition under the law. This carelessness and it was partly to cause this case was not liable to the guilty due to the carelessness of driving the LPG truck<sup>26</sup>.

However, even the legal entity might criminally act and get criminal penalty but in status of the legal entity might be only punished by the fine and confiscation of property. It was not able to get the death penalty or imprisonment detained as the ordinary people. In such case, according to the opinion of the author, the author viewed

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<sup>26</sup> Analyzed from Supreme Court, Decision No. 3446/2537.

that the legal entity who was liable to the guilty in the case of Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537) was the careless guilty which resulted to the other persons to death and being the threat to the overall environmental community. But, the punishment of the legal entity by confiscation of property was considered as the too light penalty and it was improperly in comparison to the occurring damage. Thus, the court should apply the principles for consideration of the guilty of the legal entity as legislated in the foreign law such as Corporate Probation or Corporate Manslaughter to apply for promoting the punishment to the legal entity had intensive measure and more appropriateness.

In accordance with the judgment of above case, it found that the Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537), the court judged the legal entity being liable to the guilty due to the company did not take care of the truck to be ready for use until causing the danger to the other persons and the environment. The penalty that the legal entity received was the fine and the confiscation of property, which only was improperly with the occurring damage.

Thus, introduction of the Corporate Probation for applying was an option that should be considered in such case. Also, considering the Corporate Probation of the foreign countries such as the United States. It found that in the United States the law of federal government which was the modelling law legislating the legal entity to be liable to criminal offence and giving the authority to the court for controlling the legal entity behavior by awaiting punishment by the fine and defining the conditions for controlling the behavior. This would let the legal entity report the legal entity businesses, compensate the criminal damage, provide the social service and other conditions due to the fine was not enough to let the legal entity be afraid of the law<sup>27</sup>.

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<sup>27</sup> A. Weissmann, "A New Approach to Corporate Criminal Liability " American Criminal Law Review, 44 (2007): 1319-1342.

For Thailand, the court accepted to let the legal entity be liable to the criminal offence guilty and could use the method of controlling the behavior in part of investigation and observation with the defendant which was the legal entity but it was unable to control and inspect the legal entity because the existing legal legislation did not provide the authority for the courts to control the legal entity behavior, controlling the behavior of the legal entity had many objectives for punishment, prevention of guilty, cutting the opportunity not to be done the guilty, and the correction to change the legal entity by focusing on punishment, protection and prevention of society to be safety from the crime by prevention of further guilty<sup>28</sup>. Such above method could be adapted for use in Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537), i.e. the advantage was able to punish the defendant as seen in more concrete object. In the future, it shall bring the method of controlling the legal entity behavior for applying in Thailand by using as an extra measure supporting to the fine and confiscation of property for prevention of the crimes that get damage to the economy, environment and natural resources by application to the legal entity<sup>29</sup>.

Consideration to judge the criminal punishment for the legal entity occurred in Thailand was also able to use the principle of Corporate Manslaughter for adaptation which such principle was adapted abroad as well such as in England, the Corporate Manslaughter and Corporate Homicide Act 2007 were issued to be effective to the legal entity that acted the careless guilty causing the others to death. This Act has expanded the scope of liability in this guilty more wider due to it was seen that if it had to be proved the Criminal Liability with carelessness of the legal entity by it must prove the guilty of the representative whether it was guilty by carelessness or not<sup>30</sup>.

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<sup>28</sup> Bridgeford, A. T., "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism " Human Rights and Multinational Corporation, : 1009-1056.

<sup>29</sup> Evaluated from Supreme Court, Decision No. 3446/2537.

<sup>30</sup> Hopwood, D.A., Fotwe, T.F., and Adams, K.F. 'The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007 on the Construction Industry in the UK' (2010) (ascpro0.ascweb.org) (<http://ascpro0.ascweb.org/archives/cd/2010/paper/CPRT240002010.pdf>) accessed 6 November 2013.

By the way, under the principle of common law, it might not cover in some cases. This was required to apply the Principle of Management Failure which let the consideration of only the guilty as the high-level management be error and get the failure to the organization until causing the damage to death to the others<sup>31</sup>. It is considered as the guilty considering from the Siam Gas Case (the statements of the Supreme Court, Decision No. 3446/2537), i.e. the error of high-level management of the Siam Gas Company was not effective enough due to it did not check the condition of the truck before the truck would be allowed for the employees to perform such duty until causing the severe violence and make the others to death and injuries in numbers, including the introduction of such principle applied was also looked, overall of the action of the legal entity by considering the concept, attitude and the legal entity's policy. It did not consider at the body of the representative itself, the legal entity was liable to the guilty. This Act might have some parts in similar and some might differ from the criteria of Thai law. If it has been studied and analyzed in this matter, it was considered that there might some parts which could be adapted in Thailand for better improvement of the law as well.

Also, the application of Corporate Manslaughter could establish the fairness to the victims who had been damaged by the legal entity action. This could be seen as the case of liability by the legal entity which was improper for the occurring damage of Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537). Thus, from the presentation of legal matter which could be adapted in Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537) of both two types. It was able to say that the criminal liability of the legal entity resulting from such damage by carelessness, the foreign countries focused this guilty and then there has been studied, developed and legislated the law for enforcement. Likewise, the case of Thailand it should be made like that. But, when there was the judgment to let the legal entity be liable to the guilty under Section 291 which found in Siam Gas Case (the statements of

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<sup>31</sup> Beale, S.S. (2009).

Supreme Court, Decision No. 3446/2537), it would be seen that if the two principles of law, both Corporate Probation and Corporate Manslaughter were applied with such fact, it was able to apply to be correctly penalized due to it was the case that the law legislating to punish the legal entity in this offence<sup>32</sup>.

In addition, in part of the punishment it was able to penalize the legal entity properly as well. But, when considering Thai law in the present day, the occurring problems from the application of this offence was having no law for support due to the Criminal Code did not legislate to let the legal entity be liable to the guilty of such offence, obviously, and it was unable to bring the principle of desire of the civil legal entity for comparison because in the Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537), the court gave the judgment by taking the principle of consideration of the legal entity's guilty for applying with the criteria of the Civil Law regarding to the objective of the legal entity. But, such application of principles was unable to offer clear and accurate summary due to such carelessness was different from the intent. So, it was unable to be comparable in terms of the desire of the legal entity.

Thus, when the Criminal Code did not legislate obviously how to let the consideration of the legal entity's carelessness or let see from the action of any legal entities. Responding the court has considered the legal entity being liable to the occurring guilty from such carelessness, the problem was made that which criteria of the law that the court has applied for consideration the guilty of the legal entity<sup>33</sup>. Apart from such problem, it also found that there were some problems occurring on the improper penalties for the legal entity due to the Criminal Code defined the individual to be punished as the word "whoever", even if the Supreme Court would have been basically judged that such word "whoever", it referred to the "legal entity", but when considering the guilty it did not define the appropriate penalty. It was possible that the

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<sup>32</sup> Analyzed by author.

<sup>33</sup> Evaluated from the statements of Supreme Court, Decision No. 3446/2537.

intention of drawing the law at that time did not want to punish the legal entity in general.

Therefore, when the court has judged to let the legal entity be liable to the guilty, it could be seen that the court punished especially, as it was able to perform only. The case of Siam Gas Case (the statements of Supreme Court, Decision No. 3446/2537), the court has punished by the fine at amount of only 20,000 baht, which could be said that the punishment might respond to the objectives of punishment for the legal entity in criminal case due to the punishment for the legal entity in the criminal case must be punished in order to get the impact on the legal entity grudge i.e. reputation or property etc.

According to Civil Laws, can be said that this law cannot be used to judge the wrongful action taken by the juristic person because the current business activities are different from that in the past. In other words, a business activity was originally conducted by a natural person or a small group of persons. Presently, this kind of activity is operated by a significantly larger group of persons due to rapidly growing local and international economies. To handle the changes, business activities are usually conducted by the juristic persons. It is accepted that this manner can influence the society if a juristic person causes any damage<sup>34</sup>. Naturally, Hetzer (2007)<sup>35</sup> explains any damage caused by the juristic person is more severe than that by a natural person. It does not only a sufferer(s) who take the damage, but the society is also affected. To control, prevent, and reduce wrongful actions of juristic persons; it requires criminal offences and penalties for juristic persons in order to prevent or minimize damages to the society, publics, and national economy. If civil penalties are used in criminal cases

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<sup>34</sup> W. Spurgeon, Allen, F., and Terence, P. , "Criminal Liability for Life Endangering Corporate Conduct" Journal of Criminal Law and Criminology, , 100(2) (2010)

<sup>35</sup> Hetzer, W., "Corruption as Business Practice? Corporate Criminal Liability in the European Union " European Journal of Crime, Criminal Law and Criminal Justice 383-405.

of juristic persons, then problems in consideration and social issues will occur. Put differently, Cavanagh (2011)<sup>36</sup> explains there will be no problem in penalizing a criminal who is a juristic person. Imprisoning or penalizing the juristic person's liquidator(s) or shareholder(s) also does not cause any problem.

However, the juristic person can wrongfully take various actions that may not be stated in the mentioned laws. Consequently, the application of the laws are problematic because of the different definitions and interpretations of actions in those laws; for example, a person who takes a wrongful action may be a juristic person. These facts significantly influence the interpretations and applications<sup>37</sup>.

Moreover, the another problem that is found in a case which a juristic person commits a crime that is stated in criminal laws and considered as a general criminal offense such as criminal offense against property, criminal offense against life, or criminal offense against body<sup>38</sup>.

On the other hand, Voiculescu (2009)<sup>39</sup> stated the Civil Code does not specific offenses and penalties for the juristic persons. Thus, some laws provide the offenses and penalties that are not appropriate for the juristic persons. Hence, criminal liability for a juristic person will be reviewed, especially in the Criminal Code. Regarding this issue, it was originally argued that a juristic person has to receive criminal punishment or not because the Criminal Code do not clarify this issue. Thai Criminal Code only uses a

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<sup>36</sup> Cavanagh, N. 'Corporate Criminal Liability: An Assessment of the Models of Fault.' (2011) Journal of Criminal Law, 75(5):414-440

<sup>37</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " American Criminal Law Review, : 44.

<sup>38</sup> L. Friedman, "In Defense of Corporate Criminal Liability," Harvard Journal of Law & Public Policy, 23(3) (2000): 833-842.

<sup>39</sup> A. Voiculescu, "Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability," Journal of Business Ethics, 87 (2009): 419-432.

term “any person” to refer to the status of a person. The term may refer to a natural or juristic person. By considering general provisions regarding offenses and penalties and in the Civil Code, the provisions may aim to refer to natural persons.

Accordingly, a juristic person cannot receive the criminal punishment because the provisions consider that a juristic person cannot take any wrongful action such as intentional murder. Furthermore, the criminal penalties in the Civil Code are not appropriate for criminals that are juristic person because a juristic person cannot be executed or imprisoned. Additionally, the punishment for juristic persons should not be the same as that for natural persons.

Even though, Thailand makes court judgment for the legal entity as both fines and sentences. Most Supreme Courts do only fines as seen in Supreme Court, Decision No. 3446/2537<sup>40</sup>, for instance. From this fact, it is an important point for analysis and determination for justice method-based proposal significance or practical-based proposal significance to control and take care of the guilty act of the employers to the employees in Thailand and be responsible for civil guilt of the legal entity and related laws to guide the determined penalties by comparing and analyzing foreign laws for future suggestions.

Moreover, there are other 3 interesting cases which involve on criminal liability of juristic persons. The author considers the cases to be appropriate for study and analysis of the rationales of the court’s judgement i.e. the juristic persons in the cases are at direct criminal liabilities although such liabilities are not enacted in the Criminal Code. Yet, the courts were able to carry out the punishments. Nevertheless, the rules of

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<sup>40</sup> Supreme Court, Decision No. 3446/2537: Supreme Court determines that legal entity is to accept his guilty act from his reckless causing others’ death. The Court carries out the penalties of the two guilt according to Civil Code, Section 291, the severe one. According to the Civil Code, Section 90, the first guilt (legal entity) must be penalized with 20,000 baht. The second guilt (personal entity) must be sentenced for two years and fined for 20,000 baht. The sentence for penalty suspension is three years, according to Civil Code, Section 56.

the punishment is fairly vague and the punishment itself is inappropriate to remedy or compensate the occurred damage. The cases are listed as the followings;

The first case was Klong Dan Project, the Wastewater Treatment Pond Project: Klong Dan, was the first assembling wastewater treatment project of Thailand with construction fund over 23,700 million Baht and located at Klong Dan sub-district, Bang Bo district, Samut Prakan province. The project was officially approved in B.E.2538 (1995) which later the construction contract to be signed in August B.E. 2540 (1997) with the contractor facilitated by Mr.Yingpan Manasikan; acting minister of Ministry of Science and Technology. However, the local population only knew the fact that there was such project in B.E.2542 (1999), hence opposed.

Later, the opposition went into an investigation for corruption carried out by the Investigation of Land Corruption of Klong Dan Wastewater Treatment Pond Project Subcommittee under the legal authority of the National Anti-Corruption Commission. Then, the authority issued an allegation of corruption against 3 politicians whom granted the approval of the project i.e. Mr.Yingpan (deceased), Mr.Suwat Lipatapanlope; acting minister of Ministry of Science and Technology, and Mr. Watana Assawahem; former minister of Ministry of the Interior. The allegation stated that the foresaid persons purchased land and resale it to the project as they were in active minister duties. In June B.E.2550 (2007), the National Anti-Corruption Commission resolved an allegation on Mr. Watana and processed it to the Attorneys General to prosecute in the Supreme Court's Criminal Division for Person Holding Political Positions. The allegation stated that as the accused held minister position of the Ministry of the Interior, the accused forced or persuaded the landlords to sell the lands to the accused and forced the land official to issue the title deeds for 17 pieces of lands; over 1,900 Rais in order to resell such lands to the Pollution Control Department.

In addition, the lands were mangrove forests and landfill sites which were restricted areas. Later on, Palm Beach Development Company which Mr. Somrak Assawahem and Mr. Preecha Laohapongchana were committees, purchased the lands. The company further gathered the lands, other lands owned by ReaLanThong Company which Mr. Watana and Mr. Somporn Assawahem and Mun Pantanothai were the

owners, and other additional lands into a single piece of land. This single piece of land then was brought under a mortgage to Siam Commercial Bank and later on purchased by Klong Dan Marine and Fishery Company at 563 million Baht.

In this case, Mr. Watana Assawahem had committed a crime on Official Malpractice in accordance to the Criminal Code Section 148<sup>41</sup>, 157<sup>42</sup>, 33<sup>43</sup> and 84<sup>44</sup> and the Act on National Prevention and Counter Corruption B.E.2542 (1999) Section 2<sup>45</sup>, imprisonment of 5-20 years or life in prison and fine of 2,000-40,000 Baht or death by execution. The judiciary of the Supreme Court's Criminal Division for Person Holding Political Positions had read the judgement which Mr. Watana Assawahem; former minister of Ministry of the Interior had been prosecuted by the Attorneys General on Official Malpractice of forcing or persuading others to issue the title deeds for lands

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<sup>41</sup> Thailand Criminal Code, Section 148 Whoever, to be the official, by a wrongful exercise of one's functions, to coerce or to induce any person to deliver or to procure the property or any other benefit for oneself or other person, shall be imprisoned as from five years to twenty years or to life imprisonment, and fined as from two thousand Baht to forty thousand Baht, or both.

<sup>42</sup> Thailand Criminal Code, Section 157 Whoever, being an official, wrongfully exercises or does not exercise any of his functions to the injury of any person, or dishonestly exercises or omits to exercise any of his functions, shall be punished with imprisonment of one to ten years or fined of two thousand to twenty thousand Baht, or both.

<sup>43</sup> Thailand Criminal Code, Section 33 For the forfeiture of a property, the Court shall, besides having the power to forfeit under the law as specially provided for that purpose, have the power to forfeit the following properties also, namely:

1. A property used or possessed for use in the commission of an offence by a person; or
2. A property acquired by a person through the commission of an offence.

Unless such property belongs to the other person who does not connive at the commission of the offence.

<sup>44</sup> Thailand Criminal Code, Section 84 Whoever, whether by employment, compulsion, threat, hire, asking as favor or instigation, or by any other means, causes another person to commit any offence is said to be an instigator.

If the employed person commits the offence, the instigator shall receive the punishment as principal. If the offence is not committed, whether it be that the employed person does not consent to commit, or has not yet committed, or on account of any other reason, the instigator shall be liable to only one-third of the punishment provided for such offence.

<sup>45</sup> The Act on National Prevention and Counter Corruption B.E.2542 (1999), Section 2 This Act shall come into force after one hundred and twenty days as from the date of its publication in the Government Gazette.

over 1,900 Rais at the public water lands and landfill sites which were restricted areas, then sold to the Pollution Control Department for the construction of the Wastewater Treatment Pond Project in Klong Dan sub-district, Bang Bo district, Samut Prakan province. The Supreme Court read the judgement in favour of the state i.e. the defendant illegally exercised his official status to force or persuade administrative officials and officials of Samut Prakan Provincial Land Office (Bang Phli Branch) to issue the title deeds for the lands to the defendant in the name of Palm Beach Development Company. Hence, the defendant was found guilty in accordance of Section 148 of the Criminal Code and to be imprisoned for 10 years and the Buddhist amulet “Supan LiemThong” to be confiscated.

The Court carried out the judgement to imprison and fine Mr. Watana Assawahem and other defendants for the case that the plaintiff: Pollution Control Department of the Ministry of Natural Resources and Environment sued (1) NVPSKG Joint Venture, (2) Wijitpan Construction Company, (3) Mr.Pisanu Chawananan: a Wijitpan Construction Company committee, (4) Prayongwit Machinery Company, (5) Mr.Sangwon Lipatapanlope: a Prayongwit Machinery Company committee, (6) Sisang Construction Company (1979), (7) Mr.Siroje Wongsirojekul: a Sisang Construction Company committee or “Sia-Si”: a well-known figure in construction contractors, (8) Krungton Ayinia Company, (9) Mr.Nipon Kosaiponkul: a Krungton Ayinia Company committee, (10) Gateway Development Company, (11) Mr.Rongitsarapon Chutapa: a Gateway Development Company committee, (12) Klong Dan Marine and Fishery Company, (13) Mr.Chalee Chutapa: a Klong Dan Marine and Fishery Company committee, (14) Mr.Prapas Teerasongkran: a Klong Dan Marine and Fishery Company committee, (15) Mr.Chayanut Osathanukrok: a Klong Dan Marine and Fishery Company committee, (16) Palm Beach Development Company, (17) Mrs.Bunsri Pinkayan: a Palm Beach Development Company committee, (18) Mr.Kawokwa Oyeng (a Hong Kong national): the representative of Palm Beach Development Company, and (19) Mr.Watana Assawahem: former minister of Ministry of the Interior, for fraud of lands and fraud of mutual corruption on purchasing process of 1,900 Rais lands in on Klong Dan sub-district, Bang Bo district, Samut Prakan province with overall value of 18,000 million Baht. The disputed lands are ponds, public roads and mangrove forests.

The Court sentence Mr. Watana Assawahem to 3 years imprisonment for fraud of lands and fraud of mutual corruption on purchasing process of 1,900 Rais lands in on Klong Dan sub-district, Bang Bo district, Samut Prakan province with overall value of 18,000 million Baht. The disputed lands are ponds, public roads and mangrove forests which later to be the area for Klong Dan Wastewater Treatment Pond Project construction.

For this case, the Court considered witnesses and evidences of the defendants and regarded the circumstances of the 2<sup>nd</sup> – 19<sup>th</sup> defendants were mutual cooperation *i.e.* one group would gather the lands to sell to the plaintiff and another would carry out the construction. The cooperation was unmistakably mutual. The defendants knew that the title deeds of such lands were illegal, yet sold them to the plaintiff. The defendants carried out the construction of Klong Dan Wastewater Treatment Pond Project without any expert company involved. The defendants had intention to damage the plaintiff for the shared benefits among themselves. The witnesses and evidences conveyed the judgement *i.e.* the 2<sup>nd</sup> – 19<sup>th</sup> defendants were mutually committed crime in accordance to the prosecution which was a single action. The judgement was read to imprison the 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> defendants for 3 years each and the 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, and 16<sup>th</sup> defendants would be fined for 6,000 Baht each. In addition, the case was dismissed for the 1<sup>st</sup> defendant in investigation procedure. In accordance of the judgement, and Mr. Watana Assawahem absconded the sentence of 10 years imprisonment of the Supreme Court's Criminal Division for Person Holding Political Positions on Official Malpractice to force others to perform corruptions of Klong Dan Wastewater Treatment Pond Project, Samut Prakan province. However, the defendant did not come to hear the judgement. Hence, the Supreme Court issued a warrant of arrest to the defendant to come hear the judgement and to fine the defendant according to the insurance contract. The arrest did not take place. Consequently, later the Supreme Court issued a warrant of arrest to the defendant according to the judgement. The prescription of such absconding stands for 15 years since the day the defendant had absconded in accordance to Section 98<sup>46</sup> of the Criminal Code.

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<sup>46</sup> Thailand Criminal Code, Section 98 If any person, convicted by the final judgment, has not yet undergone the punishment, or has not completely undergone the punishment on account of having

The second case was Credit Union Klong Jan, in B.E. 2556 (2013), a large number of Credit Union Klong Jan .ltd members were not able to withdraw their money from their own accounts. As the investigation took place, the corruption of Suppachai Srisuppaaksorn: former director of the Union and others was presented. The suspects delusively withdrew money out of the Union and altered the accounts to conceal such crime.

The action cause monetary leaks of 16,725 million Baht by 4 channels i.e. (1) the lease for associate members which were 28 juristic persons in approximation of 11,000 million Baht, (2) disbursement of advance money for 3,298 million Baht, (3) distribution of charity to Dhammakaya temple, the abbot and secretary abbot for 937 million Baht, and (4) investment of Saha Life Insurance Company by shares purchase for 300 million Baht which caused monetary liquidity inefficient. Approximate of 56,469 members who owned 7,823 million Baht could not withdraw their deposit money. Most importantly, this money was the fund from other 76 unions which was secured there as deposit of approximately 7,700 million Baht. The growing concern is that the 76 unions with 300,000 members would as well be at inefficient monetary liquidity.

Therefore, the risk and gaps that the current director of the Union would perform corruption is inevitably high. This intransparency of disbursement and investment of the Union should be mended by increase of monitoring the financial stability in

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made an escape, and such person is not brought to undergo the punishment till the following periods of time reckoning from the day of the final judgment, or the day on which the offender has made the escape, as the case may be, the execution of punishment shall be precluded by prescription, and the punishment shall not be inflicted upon such person:

1. After twenty years in case of a sentence to death, to imprisonment for life or to imprisonment of twenty years;
2. After fifteen years in case of a sentence to imprisonment of over seven years but not up to twenty years;
3. After ten years in case of a sentence to imprisonment of over one year up to seven years;
4. After five years in case of a sentence to imprisonment of one year downwards or any other punishment.

accordance to the international standard including strict and regular examination directly from the institution in charge.

The third case was Rai Som Case, in June B.E. 2546 (2003), MCOT Public Company Limited made a contract to Mr. Sorayuth Suthassanachinda to be a daily MCs of “Tung-Look-Tung-Kon” TV program with the wage of 5,000 Baht per scene.

Later on, the popularity of the program went high. In February B.E. 2547 (2004), Mr. Sorayuth had established Rai Som Company Limited which Mr. Sorayuth was the managing director and Ms.Aungana Watanamongkonsin, and Ms.Sukanya Salim were directors. Then, the company made a contract with MCOT Public Company Limited with contractual duration from 1 February B.E. 2548 (2005) to 15 July B.E. 2549 (2006) for “Kuy-Kuy-Kow” program which was broadcasted every Saturday and Sunday at approximate time of 12.00-13.00 hours, 60 minutes each broadcast (including advertisements). MCOT Public Company Limited agreed to divide the ad time for Rai Som Company Limited for 5 minutes per each broadcast if exceeded Rai Som Company Limited would have to pay at least 200,000 Baht per minute as exceeding ad time fee.

Moreover, another contract was formed naming “Kuy-Kuy-Kow” program which was broadcasted every Monday to Friday at approximate time of 21.30-22.00 hours, 30 minutes each broadcast (including advertisements). MCOT Public Company Limited agreed to divide the ad time for Rai Som Company Limited for 2 minutes and 30 seconds per each broadcast if exceeded Rai Som Company Limited would have to pay at least 240,000 Baht per minute as the exceeding ad time fee.

During B.E. 2549 (2006), the labor union of state enterprise MCOT Public Company Limited inspected that Rai Som Company had not pay the ad time fee for almost 100 million Baht. Although the MCOT had finally received its exceeding ad time fee over 138 million Baht and as interest included was 152 million Baht, the MCOT yet formed two investigating teams to investigate the case. The result of both teams indicated that a crime had been committed.

As the case reached to the the National Anti-Corruption Commission, the Commission had found that Mrs.Pichapa (Chanapa) Iemsa-ad (Bunto): an administrative official level 5<sup>th</sup>, Marketing Strategy Department of the MCOT Public Company Limited, as being in responsibility to arrange the advertisements and the reporter of any exceeding ad time to collect the exceeding ad time fee from Rai Som Company Limited, had provided favors to Rai Som Company Limited by refraining the report of the exceeding ad time of Rai Som Company Limited to collect the exceeding ad time fee from 4<sup>th</sup> February B.E. 2548 (2005) to 30<sup>th</sup> June B.E. 2549 (2006).

The investigation indicates that Mr. Sorayuth had signed cheques of Thanachart Bank, Pra Ram 4 Branch paying to Mrs.Pichapa together with the existence of 6 current tax payment documents in total of 739,770 Baht as the exchange for refraining the report of the exceeding ad time by Mrs.Pichapa.

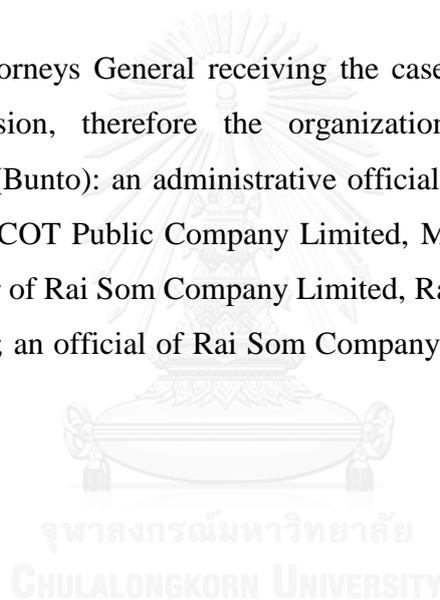
Later in July B.E. 2549 (2006), Mrs.Buntanik Bulsin, the acting deputy director of the 1<sup>st</sup> Marketing Department, had noticed that “Midnight News” program had delayed its broadcasting and thus investigated the issue. Mrs.Buntanik called upon Mrs.Pichapa to ask about the issue in front of all the staffs. Mrs.Pichapa admitted before all the staffs that Rai Som Company Limited has the exceeding ad time and that she did not report for such exceeding ad time fee. Furthermore, Mrs.Pichapa applied a correcting pen to erase the exceeded advertisement time of Rai Som Company Limited in the arrangement of advertisement of MCOT in order to conceal such crime in accordance to the suggestion of Mr. Sorayuth and Ms.Monta Teeradech; official of Rai Som Company Limited before the investigation took place.

Then, Rai Som Company Limited made payment of the exceeding ad time fee to MCOT on 31<sup>st</sup> August B.E. 2549 (2006) and 15 September B.E. 2549 (2006) for 103,953,710 Baht. However, the amount is the attempt from Rai Som Company Limited to negotiate deduction of 30% from the outstanding payment of 138,790,000 Baht. MCOT did not agree because Rai Som Company Limited did not sincerely fulfil its contractual duty by deliver the correct payment in accordance of the contract. MCOT, therefore, charged 7.5% interest to the outstanding amount of 138,790,000 Baht from 1<sup>st</sup> April B.E. 2548 (2005) to 20<sup>th</sup> October B.E. 2549 (2006) for 4,464,197.67

including VAT for 9,715,300 Baht. The final outstanding amount in total was 152,969,497.67 Baht. Rai Som Company Limited consequently paid MCOT the amount on 20<sup>th</sup> October B.E. 2549(2006).

On 20<sup>th</sup> September B.E. 2555 (2012), the National Anti-Corruption Commission has issued 7-0 vote resolution to condemn Mrs.Pichapa: an administrative official level 5<sup>th</sup>, Marketing Strategy Department of the MCOT Public Company Limited serious disciplinary and criminal offenses together with Mr.Sorayuth Suthassanachinda; the managing director, Ms.Monta Teeradech; an official, and Rai Som Company Limited criminal offense of corroborating offense of official.

After, the Attorneys General receiving the case file from the National Anti-Corruption Commission, therefore the organization has charged Mrs.Pichapa (Chanapa) Iemsa-ad (Bunto): an administrative official level 5<sup>th</sup>, Marketing Strategy Department of the MCOT Public Company Limited, Mr.Sorayuth Suthassanachinda; the managing director of Rai Som Company Limited, Rai Som Company Limited, and Ms.Monta Teeradech; an official of Rai Som Company Limited in accordance to Act



on the Offences Committed by Officials of State Organizations or Agencies, B.E. 2502 (1959), Section 6,8, and 11<sup>47</sup> together with the Criminal Code, Section 86<sup>48</sup> and 91<sup>49</sup>.

In addition, the offenses in accordance to the Offences Committed by Officials of State Organizations or Agencies, B.E. 2502 (1959) are as the followings; Section 6 –an official illegally solicits property or benefit is subjected to 5-20 years of imprisonment or life imprisonment or execution and fine 2,000-40,000 Baht, Section 8

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<sup>47</sup> Act on the Offences Committed by Officials of State Organizations or Agencies, B.E. 2502 (1959)

Section 6 Any person who is an official and, either for his own sake or for the sake of a third person, unlawfully solicits, accepts or promises to accept any property or benefit in exchange for the performance of or refrain from any act in his official capacity shall, whether such act is in breach of his official duty, be liable to imprisonment from five years to twenty years or for life and a fine from two thousand baht to forty thousand baht, or to death.

Section 8 Any person who is an official in charge of the purchase, creation, administration or safekeeping of any property and dishonestly exercises his official authority in a manner detrimental to his own organ, limited company, partnership with legal personality or agency called otherwise shall be liable to imprisonment from five years to twenty years or for life and a fine from two thousand baht to forty thousand baht.

Section 11 Any person who is an official and unlawfully performs or refrains from his official duty so as to impair another, or dishonestly performs or refrains from his official duty, shall be liable to imprisonment from one year to ten years, or a fine from two thousand baht to twenty thousand baht or both.

<sup>48</sup> Thailand Criminal Code, Section 86 Accomplice

Whoever does for any reason whatsoever as assist or facility to any other person committing an offence before or late time of committing the offence, even though such assistance or facility is not known by the offender, such assistant deemed to be supporter in committing such offence shall be punished by two-thirds of the punishment as provided for such offence.

<sup>49</sup> Thailand Criminal Code, Section 91 Multiple Distinct Offenses

If it appears that any offender has committed the several distinct and different offences, the Court may inflict upon such offender the punishment prescribed for each offence. But, whether there shall be increase of the punishment, reduction of the punishment or reduction in the scale of the punishment, or not, the total punishment of every offence must not exceed the following determination:

1. Ten years in case of the severest offence to have the rate of the maximum punishment of imprisonment not exceeding three years;
2. Twenty years in case of the severest offence to have the rate of the maximum punishment of imprisonment exceeding three years upwards, but not more than ten years;
3. Fifty years in case of the severest offence to have the rate of the maximum punishment of imprisonment exceeding ten years upwards, unless in the case where the Court inflicts upon the offender the punishment of imprisonment for life.

–dishonestly exercise official authority is subjected to 5-20 years of imprisonment or life imprisonment and fine 2,000-40,000 Baht, and Section 11 –illegally perform or refrain from official duty is subjected to 1-10 years of imprisonment or fine 2,000-20,000 Baht or imprisonment and fine. If Mrs.Pichapa (Chanapa) has been convicted, she would be punished accordingly by the discretion of the Court.

For Mr.Sorayuth, Ms.Monta, and Rai Som Company Limited, if found guilty, they would face two in three of the foresaid punishments for corroborating offense of official.

Hence, These 3 interesting cases that concern on criminal liability of juristic persons are appropriate for study and analysis of the rationales of the court's judgement and if the higher executive representatives committing offenses shall be punished on direct criminal charge for juristic persons.

## 1.2 Objectives of Study

1. To study guidelines or practical ways to carry out civil cases on the legal entity's guilty act resulting in legal relation according to employment contract in Thailand.

2. To study legal action experience on guilty act of the legal entity in foreign countries which use legal labor relation limitations to be guidelines for problem and challenge learning.

3. To study the appropriateness and the possibility of bringing the civil responsibility procedures of the legal entity in legal labor relation in foreign countries to use with Civil Code in Thailand.

4. To study in the condition if there is a case process for the responsibility of the legal entity in legal labor relation in foreign countries to use with Civil Code in Thailand, how Thailand needs to adjust the law or court procedure.

### 1.3 Research Hypothesis

By considering the intention and negligence of employers and employees in organizations, it can be stated that the employers must be responsible for their employees. This includes a case that an employee commits a criminal action. Courts should consider the employers' and employees' intention that cause damages. In other words, the employers' responsibilities depend on the intention. Hence, Thailand should pay attention to the liability of the employers that affect the legal relationships in order to support business organizations in Thailand to smoothly and sustainably operate their businesses. In order to fix the problem regard on Corporate Criminal Liability in Thailand, the author suggests to put specific punishments on the juristic person under the laws that are involved in criminal liabilities specifically apart from natural person and such punishments should be accorded to Thailand's Civil Law.

### 1.4 Scope of Research

The number of cases that the legal entity employers did to their employees, determined by the Civil Court between 2007–2013, is considered for the characteristics, the causes, the guilt acts and the judgments. Besides, the author considers to use the law and cases in specific countries such as France and Germany in order to analyze the criminal liability for employment and the vicarious liability from the regulations of those countries which can be adapted for use with the Corporate Criminal Liability Law in Thailand.

### 1.5 Method of Study

The study uses documentary research, consisting of legal documents about civil guilt of the legal entity within legal labor relation in both Thai and Foreign languages. Also, secondary research is used. For examples, official records, organizational records, reports, magazines, press and reliable websites.

### 1.6 Expected Benefits

1. To understand both the advantages and disadvantages about the legal process for the legal entity in Thailand by studying the experience in similar cases abroad.

2. To acknowledge whether the case judgment of the legal entity involving legal relation in foreign countries to be adopted with Thai law and regulations is appropriate or not and whether it helps the losing party in terms of fairness.

3. To receive the proposal from regulation drafting with group procedure in administration case involving criminal enforcement.

4. The results obtained from the study are able to indicate that the deployment of related law and the criminal offence caused by the action of the legal entity correctly in accordance with legal way and having the appropriateness.

### 1.7 Literature Reviews

L.H. Leigh, 'The Criminal Liability of Corporations and Other Groups' [1977] *Ottawa Law Review*, vol. 9 247, 252- this article presents the history of Corporate Criminal Liability which can be used as the information to analysis in this study.

Andrew Weissmann, 'A New Approach to Corporate Criminal Liability' [2007] *American Criminal Law Review* vol. 44, 1319-1342- provide the concept thinking regarding the new approach of criminal corporate liability that is related to the main purpose of this study.

Albert Alschuler, 'Two Ways to Think about the Punishment of Corporations' [2009] *Faculty Working Papers*, Paper 192. Northwestern University 1191, 1202- this article compares the criminal punishment of corporations in the twenty-first century with two ancient legal practices—deodand (the punishment of animals and objects that have produced harm) and frankpledge (the punishment of all members of a group when

one member of the group has avoided apprehension for a crime). Therefore, this information can be used as the data to analysis in the second chapter.

Thailand Civil and Commercial Code- provide the law sections. Some of them can be used as data to explain in this study, especially topic regarding Thai laws.

## 1.8 Thesis Procedures

This study consists of five chapters as following:

### Chapter 1: Introduction

This chapter describes research background, aims and the objectives of the study, the research hypothesis, scope of research, method of study, expected benefits, court decision relates to the content as well as literature reviews. Therefore, the overview of each chapter is also revealed in this part.

### Chapter 2: Concept of Corporate Criminal Liability

The literature review regarding to the Corporate of Criminal Liability that relates to the objectives of the study is divided into 5 main topics. The first topic, introduction, describes in detail and structures of this part. The concept and information regarding to the Corporate Criminal Liability will be explained in the areas both Thai and Foreign laws according to the second topic “Corporate Criminal Liability”. The third section explains characteristics and legal principles by using the various sources of petition in order to support the explanation regarding the Corporate Criminal Liability in the Civil and Common Law Systems. The fourth section shows the concept of Corporate Criminal Liability for employment especially legal principles and punishments. Finally, the last topic is the conclusion part which shown the summary of main idea of the Chapter 2.

### Chapter 3: Concept of Criminal Liability under Foreign Law

First section is the introduction part which explains about the introductory of the Chapter 3. The second part is the Corporate Criminal Liability under foreign law- In this section, the author divides the foreign law into 2 types; Common Law will explain about the law of the United States of America, and the United Kingdom, while Civil law will explain about the Corporate Criminal Liability law of France, Japan, and Germany. The third section will explain about the Corporate Criminal Liability under Thai law in order to make the comparison with foreign laws. The fourth section is the topic regarding the common punishments for the juristic person in other countries which explain about types of Corporate Criminal Liability and various types of the Punishment. The fifth section is the topic regarding the principle of Vicarious Criminal Liability of organizations in Thailand and the last section is the conclusion part.

#### Chapter 4: Analysis of Corporate Criminal Liability

This chapter is the analysis and discussion part which consists of 5 main parts as; Analysis of the law regarding to Corporate Criminal Liability, Analysis of Specific Provisions for Corporate Criminal Liability, Analysis of the Corporate Criminal Liability in Thailand that should be changed; explains the corporate types, Comparison legal principles and the punishments for Corporate Criminal Liability both Civil and Common Law Systems. and Finally, analyze the foreign law's principles that can apply and solve many problems for Corporate Criminal Liability in Thai law.

#### Chapter 5: Conclusions and Recommendations

This chapter presents the conclusion from the finding and analysis which relates to research topic, objectives of the study to evaluate the result of the study, and also summarize related with the analysis of Corporate Criminal Liability for Employment, as well as the recommendations of the appropriate legal principles and punishments that are presented in this part.

## 1.9 Terminology

*Legal entity* means a group of people or organizations that the law does not consider as normal people and has legal rights and duties (Dictionary, Royal Institute, 1999), can own property, can be guilty, can be defendant and can be legally protected etc.

*Representative of legal entity*, was the one who has had authority for managing instead of the legal entity. It might be only one or more than one such as the Minister as the representative of Ministry, the Director-General as the representative of the Department, the abbot as the representative of temple, the committee as the representative of the company, etc. When the representatives have managed any actions for the legal entity within the scope of objectives and under the provisions of law, such actions should be confined the legal entity. The authority of the legal entity usually was defined in the law or regulation or document in the foundation of the legal entity. And if there were many managers and there was not the other regulation, any agreements in business organization should follow the majority if the representative or person to authority on behalf of the legal entity which have performed the duties and caused the damages either to any other persons. The legal entity must pay compensation for the damage but having the right to request exhaustively for compensation from the person who made the initial cause of damage occurring later, but if the damage was not within the scope of the objectives of the legal entity or authority of the legal entity, those persons who have agreed for the actions instead of the manager and other representatives as the managers and other representatives as the persons acted at hands for should be jointly responsible for compensation.

*The agent* refers to the person who has been assigned as the agent for any actions assigned by the person who is responsible for performing the activity correctly under the law.

*The employer* refers to the person who agrees to offer the employees for working by paying the wages, and shall include the person who is assigned by the employer for working on behalf of. In case of the employer is the legal entity, it refers to the person

authorized to act on behalf of, and shall include the person who has been assigned of authority on behalf of the legal entity.

*The employee* refers to the person who agrees to work for the employer under the command of the employer who assigned to work according to the hours set by the employer and must follow the rules or regulations on the law and fairness of the employer.

*The representative of legal entity and employee* would be different in figures of responsible duties assigned by the employer, i.e. the employee may be assigned by the employer who is only the ordinary person. But, any representatives of legal entities who perform the duties or perform any actions on behalf of the legal entities, both directly and indirectly.



## CHAPTER 2

### CONCEPT OF CORPORATE CRIMINAL LIABILITY

#### 2.1 Introduction

In Thailand, generally, the guilty act must be considered due to acting fault, authority of the representative(s) and the objectives of each legal entity. According to the previous judgment, it is doubted that, in the case that the guilty fault does not occur with intention, any reckless guilt and legal fault, the legal entity must be responsible or not. For guilt with no intention case, if the acts are performed by the representatives that do their authority, within the objectives of legal entity and the legal entity receives benefits. Therefore, the legal entity must be responsible for the guilt as the acts of the representatives are considered as the acts and intentions of the legal entity. In guilt act with imprudent, the imprudent of legal entity cannot be considered as the intention of the legal entity as it is not the intentional act leading to the consequences.

So, it cannot be considered as the intention of legal entity. By considering the relationships between a violator and suffer, it is found that the one who must be responsible for a violation is the violator. This is except that the violator is a minor. In that case, his or her legal representative must be responsible for the violation. However, some types of legal relationships force persons who do not commit violations to be responsible for the actions. That is, an employer must be responsible for his or her official employee's violation.

In this chapter, the explanation about Corporate Criminal Liability which provide information in the areas both Thai and Foreign laws will be written as the following steps;

#### 2.1 Introduction of the chapter

## 2.2 Corporate Criminal Liability

### 2.3 Corporate Criminal Liability under Thai law

### 2.4 Principle of Vicarious Criminal Liability of Organizations in Thailand

## 2.2 Corporate Criminal Liability

### 2.2.1 Introduction of Corporate Criminal Liability

Commonly, the objectives of Corporate Criminal Liability are to prevent a crime and to punish a criminal. Regarding the punishment, a government officer (a police officer or prosecutor) can prosecute a criminal and a criminal must be punished, although there is no direct damage on any person. To punish the criminal, the Moral Wrongness Approach considers that the criminal's action must be an action that is morally wrong. Nevertheless, the approach is disputable because of its limitations<sup>50</sup>. As this approach considers morals, punishments are only limited to immoral actions and do not include violations of common interests. Some the social members also think that the members should not be involved in the actions. It is unclear whether the society will condemn the actions or not. Furthermore, the approach may cause biases because it concerns feelings, not reasons from discussions. However, Burton (2008)<sup>51</sup> said humanitarianism considers that individual autonomy must be protected. According to the Harms to Other Approach, the criminal judgments are changed. In other words, a person who takes any action that violates a right or benefit of any other person shall be punished.

Although, this approach can prevent feelings to be used as tools to punish a criminal, it cannot solve all possible problems. By strictly following this approach, a

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<sup>50</sup> Antony Duff, "Theories of Criminal Law" ([Http://Plato.Stanford.Edu/](http://Plato.Stanford.Edu/)) ([Http://Plato.Stanford.Edu/Entries/Criminal-Law/](http://Plato.Stanford.Edu/Entries/Criminal-Law/)) "(2002).

<sup>51</sup> J.K. Burton, "A Principle Approach to Criminalisation: When Should Making and/or Distributing Visual Recordings Be Criminalised?" (Doctoral Dissertation, University of Southern Queensland 2008), p. 72.

person who has a behavior (e.g. homosexual behavior) that may be dangerous for the social security and should be prevented may not be considered as a criminal because the behavior is mutually agreed by parties. Additionally, a person who has a behavior (e.g. riding a bicycle or motorcycle without wearing a helmet) that may not harmful for the others but it is dangerous for the person and indirectly affects the society cannot be punished. Thus, approaches about criminal liability are differed. Then, the Community Welfare Approach is used to judge a criminal. Accordingly, a person who takes an action that affects peace or morals will be punished. The mentioned approach can solve problems caused by the old approaches. It is also flexible because the action that affects peace or morals of the society may not affect the other societies<sup>52</sup>. During the middle of 1970s, the Law Reform Commission of Canada developed the principles that are accepted in the jurisprudence field because they are the appropriate principles for judging criminal actions and consider both dangerous actions and social peace. That is, the principles

- Considers whether an action seriously harms the other people or not,
- Judges whether the action violates fundamental values and then harms the society or not,
- Decides whether a punishment for the action violates the fundamental values or not, and
- Reconsiders whether the punishment can solve the problem or not.

However, the jurists had two points of view about the consideration of a criminal action. From the first point of view, the person who took the action should be punished, while the other point of view was contrary. Originally, the juristic person was not punished for its crime(s). If its officer or worker committed a crime according to its order, then only the officer or worker would be punished because a defendant must appear in a court in a criminal case. Moreover, there were opinions supporting that the

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<sup>52</sup> *Ibid* 38-40.

juristic person does not physically exist and then it could not intentionally commit the crime<sup>53</sup>. Accordingly, if the crime that was committed by the legal representative of the juristic person was considered that it was committed with the intention of the juristic person, then the criminal action must be taken according to the juristic person's objective. Nevertheless, the crime was surely not under the objective. Furthermore, opinions supported that the juristic person did not have physical body and then it could not be punished. By this statement can be considered the case *Rex v. Canadian Allis-Chalimer Ltd*<sup>54</sup>. In 1923 which provided the Corporate Criminal Liability; what a rank or position of officer or employee or other agent would have to be in order that his negligence might be deemed to be the corporation cannot stated generally: what would be, in the case of a "one man" the company might be quite inaccurate in the case, the company whose lines extend across a continent: but in every case the evidence must be such as to justify a finding that the company- the employer- was negligent, or there can be no conviction.<sup>55</sup>

After, developments and more juristic person conducted businesses. Most of jurists thought that if the juristic person could not be punished, then these may cause damage to countries and people. Thus, the juristic person must be punished for their crimes in cases that their negligence was considered as nonfeasance or a crime<sup>56</sup>. The first case that a juristic person was punished for its criminal action was the case of *R.v. Birmingham and Gloucester Ry. Co. (1840)*<sup>57</sup>. It was the case that the defendant did not

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<sup>53</sup> Leigh H.L., "The Criminal Liability of Corporations and Other Groups," Ottawa Law Review, 9 (1977): 247-252.

<sup>54</sup> In *Rex v. Canadian Allis-Chalmers Ltd.*, the Ontario Supreme Court (Appellate Division) quashed a conviction against a corporation under sections 247 and 248, of the Criminal Code for causing grievous bodily harm by negligence in the operation of a dangerous agency (in this case a construction crane).

<sup>55</sup> Leigh H.L., "The Criminal Liability of Corporations and Other Groups," Ottawa Law Review, : 253.

<sup>56</sup> Demott A.D., "Our Partners' Keepers? Agency Dimensions of Partnership Relationship," Law and Contemporary Problems, 58(2) (1995): 109-125.

<sup>57</sup> In this case explained that "there were many modern cases 'which shew that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving

repair a highway. Eventually, it was judged that the juristic person may be punished for this misfeasance. Another similar case was the case of *R.v. the Grent North of England Railway Ry. Co. (1846)*<sup>58</sup>, which obstructed a highway. By this case, Lord Denman said about acts of immorality that: “These plainly derive their characters from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, it has no such duties, it cannot be guilty in these cases: but they guilty as a body corporate of commanding acts to be done to the nuisance of the community at large.”<sup>59</sup>

Later, the legislative of England approved the judgments by legislating the Interpretation Act 1889, which stated that to interpret laws about criminal punishments, the term “person” shall also refer to a juristic person unless otherwise stated. In the case of *Moussell Bros Ltd. v. London and North Western Railway Co., (1917)*, it considered in a case that a natural person might be punished for other person’s action as he or she ordered the other person to take the action; a juristic person might be punished in a similar case. In mentioned case, an employee of the defendant’s company provided false information about products in order to avoid fees. In this case, the company must also be punished<sup>60</sup>. According to this consideration, a juristic person must also be punished

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personal violence, as for riots or assaults’. The fact that the corporate person could not be imprisoned or arraigned for contempt was no stop on an indictment; certiorari could be used to remove the case to Queen’s Bench where a suitable remedy could be devised.” Accessed Joshua Getzler, ‘Disciplining the corporation through tort liability and disability’ (2010) Individual report, St Hugh’s College and Faculty of Law, University of Oxford 1, 20.

<sup>58</sup> *R.v. the Grent North of England Railway Ry. Co. (1846)*. 115 E.R. 1294. In Birmingham & Gloucester Railway, it was held that an indictment would lie against a company for failing to obey the order of the magistrates to construct arches to connect land which the construction of the railway had severed. No individual officer was (or could have been) charged with failure to perform this duty. The only person who could commit the offence as a principal was the corporation. Nor was it thought necessary to identify any officer who had procured the commission of the offence.

<sup>59</sup> F.K. Brickey, "Corporate Criminal Accountability: A Brief History and an Observation," *Washington University Law Review*, 60(2) (1982): 393-405.

<sup>60</sup> By considering this case, Kyriakakis (2009) supported that, “Wells identifies the King’s Bench decision of *Moussell Bros v. London and North Western Railway* in 1917 as the first indication in English law that corporate liability might move beyond strict liability or nuisance, albeit that the implications of this

in a case of defamation because the juristic person must be responsible for its employee's action. An example of defamation cases was the case of *Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass Ltd. (1939)* which stated that "asserting that court could see no ground for depriving a juristic person of those safeguards which the law of England accords even the least deserving of natural person"<sup>61</sup>. Even though, the juristic person might be punished, it did not physically exist.

Therefore, the juristic person could only be fined. In a case of an assault, the juristic person would not be punished because it could not physically attack any person. By summarizing the judgments of the English Courts and laws, the juristic person is punished as in similar case as that of the natural person, except for actions such as perjury, bigamy, and murder which can only be taken by the natural person. Put differently, a criminal action is intentionally taken by the legal representative is considered as an intentional action of the juristic person.

In Thailand, the juristic person may be punished in the following cases.

Firstly, if laws (e.g. the Act Determining Offences Relating to the Register Partnership, Limited Partnership, Limited Company, Association, and Foundation, B.E. 2499) state that the juristic person must be punished for its criminal action, then the juristic person will be punished<sup>62</sup>.

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decision did not eventuate until some time later." Accessed Kyriakakis, J. 'Corporate Criminal Liability and The ICC Statute: The Comparative Law Challenge' (2009) Netherlands International Law Review, 10:333-337.

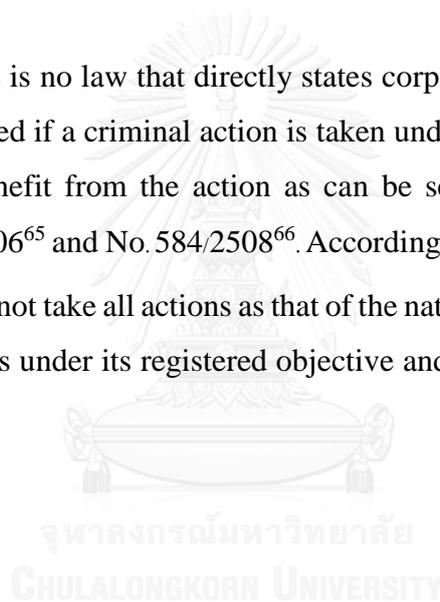
<sup>61</sup> M.R. Mosk, and Ginsburg, T. , "Evidentiary Privileges in International Arbitration' " The International and Comparative Law Quarterly, 50(2) (2001): 345-359.

<sup>62</sup> The Act Determining Offences Relating to the Register Partnership, Limited Partnership, Limited Company, Association, and Foundation, B.E.2499 (1956) Section 42 "Any person who, being responsible for the operation of affairs of a registered partnership, limited partnership or limited company, commits or gives consent to any of the following acts:

(1) damaging, destroying, altering, lessening or forging any account, document or security of the partnership or company or in connection with the partnership or company; or

Secondly, if laws state that the juristic person must be responsible for other persons' action, then the juristic person will be punished. According to the Notebook, Document and Newspaper Act, B.E. 2470 (1927), an owner must be responsible for a mistake in an advertisement in a notebook, document, or newspaper. In other words, a limited company who owns a newspaper must be responsible in a case of a defamation text in the newspaper<sup>63</sup>. Regarding the Mining Act, B.E. 2461 (1919), although a holder of a patent permit for a mine who submits incorrect information about minerals is a limited company and a manager of the company is the one who prepare the information, the holder will still be punished<sup>64</sup>.

Thirdly, if there is no law that directly states corporate liability, then the juristic person will be punished if a criminal action is taken under its objective and the juristic person receives a benefit from the action as can be seen from the Supreme Court, Decision No. 1669/2506<sup>65</sup> and No. 584/2508<sup>66</sup>. According to the judgments, even though the juristic person cannot take all actions as that of the natural person, it will be punished if its criminal action is under its registered objective and it receives a benefit from the action.




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(2) making false entries or failing to enter essential particulars in an account or a document of the partnership or company or in connection with the partnership or company,

\* shall be, if the act or the consent thereto is committed or given with an intent to fraudulently deprive the partnership, the company, partners or shareholders of due benefits otherwise obtainable, liable to imprisonment for a term not exceeding seven years or to a fine not exceeding one hundred forty thousand Baht or to both.”

<sup>63</sup> Supreme Court, Decision No. 265/2473.

<sup>64</sup> Supreme Court, Decision No. 185/2489.

<sup>65</sup> Supreme Court, Decision No. 1669/2506 is of a case that a managing director of a company forged documents and used the forged documents.

<sup>66</sup> Supreme Court, Decision No. 584/2508 is of a case that document forgery in business of a juristic person.

By referring to Supreme Court, Decision No. 59/2507<sup>67</sup>. The juristic person can express its intention through its legal representative. If the legal representative issues a cheque in order to prevent the cheque to be cashed, then the juristic person and legal representative will be punished.

Regarding Supreme Court, Decision No. 1620/2508<sup>68</sup>, if there is a contaminated canned food in a store, then the owner or limited company will be punished according to the Food Quality Control Act, B.E. 2484 (1941).

According to Supreme Court, Decision No. 637/2509<sup>69</sup>. A shareholder of a limited company that conducts a business similar to an insurance business according to the Sections 861<sup>70</sup> and 889<sup>71</sup> of the Civil and Commercial Code must be permitted to conduct the business, otherwise the shareholder will be punished under the Sections 7 and 8 of the Act on Trade Control so as not to Affect the Security and Well-Being of the Public, B.E. 2471 (1928)<sup>72</sup>. If a criminal action taken by the legal representative is not under the objective of the juristic person, then only the legal representative will be punished as stated in Supreme Court, Decision No. 1050/2504. Accordingly, if a limited company does not have an objective to conduct an insurance business and its manager conducts a business that is similar to an insurance business that violates the Act on

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<sup>67</sup> S. Hansuthiwarin, "Criminal Liability: Cashed Cheque (Http://Www.Bangkokbiznews.Com/Home/Detail/Politics/Opinion/Sakol/20120508/450309) "(2012).

<sup>68</sup> *Ibid.*

<sup>69</sup> See Online [http://www.lawreform.go.th/lawreform/images/th/jud/th/thsc/2500/cd\\_2842.pdf](http://www.lawreform.go.th/lawreform/images/th/jud/th/thsc/2500/cd_2842.pdf)

<sup>70</sup> Thailand Civil and Commercial Code Section 861, A contract of insurance is one in which a person agrees to make compensation or to pay a sum of money in case of contingent loss or any other future event specified in the contract, and another person agrees to pay therefor a sum of money, called premium.

<sup>71</sup> Thailand Civil and Commercial Code Section 889, In a contract of insurance on life, the payment of the sum of money is dependent upon the life or death of a person.

<sup>72</sup> See Online (<http://dl.parliament.go.th/handle/lirt/13864> ).

Trade Control so as not to Affect the Security and Well-Being of the Public, B.E. 2471 (1928)<sup>73</sup> only the manager will be punished.

### 2.2.2 Common Characteristics of the Juristic Person

According to the aforementioned meaning of the juristic person, it indicates the important or common characteristics of the juristic person. Although, the juristic person is considered as the legal person, it does not have consciousness for declaring its intentions and taking actions by itself. It must rely on individuals in order to declare its intentions and take actions. Therefore, the juristic person is different from an individual. Thus, the common characteristics of the juristic person should be considered.

Since, the juristic person is a legal person, the specific types and methods for the establishments of the juristic person is needed. Laws that permit groups of individuals or organizations to establish juristic persons may also be necessary. For Thai laws, Section 65 of the Civil and Commercial Code states that “[a] juristic person can be established under this or any other law.” This law reflects that the establishment of the juristic person in Thailand must comply with the law or other laws. Juristic Person established under this law include associations, foundations, registered partnerships, limited partnerships and limited companies. There are also other types of the juristic person established under other laws.

In some cases, laws may allow organizations or organizations to instantly establish the juristic person. In other cases, procedures are needed. However, the juristic person must be legally established. For example, Section 7 of the National Government Organization Act, B.E. 2534 (1991), states that the Prime Minister’s Office; ministries; bureaus with statuses equivalent to the ministries; bureaus belonging to the Prime Minister’s Office or ministries; departments; or other public organizations with statuses equivalent to the departments belonging or not belonging to Prime Minister's Office,

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<sup>73</sup> *Ibid.*

ministries or bureaus cannot be juristic persons if there is no law permitting the entities to do so<sup>74</sup>.

Supreme Court, Decision No. 4374/2539<sup>75</sup>. The original version by Section 68<sup>76</sup> of the Civil and Commercial Code states that the juristic person can be established under this or any other law. Since, there was no law permitting Phra Nakhon District Office, the second defendant, and Bangkok Metropolis Land Office, the fourth defendant, to be juristic person, the two defendants were only public organizations belonging to Bangkok, the first defendant, and the Department of Lands, the third defendant, respectively. Consequently, the plaintiff could not sue the second and fourth defendants.

Supreme Court, Decision No. 1583 - 1587/2521<sup>77</sup>. The deceased's heritage was not the juristic person. Thus, the plaintiff could not sue the heritage in order to receive the punishments together with the individual violating the plaintiff.

Supreme Court, Decision No. 766/2518<sup>78</sup>. The bidding evaluation committees were not juristic person or individuals that could be sued in civil cases.

Considering the liability of the juristic person, the representative and the juristic person member of committee can be explained that when the juristic person has its function, whether it is the function as directly specified by the law or the function towards the other persons according to legal relations as legislated including the

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<sup>74</sup> P.D. Stewart, "International Decision," The American Journal of International Law, 107 (2013): 601-621.

<sup>75</sup> Supreme Court, Decision No. 4374/2539.

<sup>76</sup> Thailand Civil and Commercial Code, Section 68 The domicile of a juristic person is the place where it has its principal office or establishment, or which has been selected as a special domicile in its regulation or constitutive.

<sup>77</sup> Supreme Court, Decision No. 1583 - 1587/2521.

<sup>78</sup> Supreme Court, Decision No. 766/2518.

function that does not break or violate the rights of others. If the juristic person does not perform the function or act as breaking or violating the rights of another juristic person, it must have liability as well as the ordinary person. This may be separated for consideration as follows;

#### 2.2.2.1 Civil liability

The civil liability is always arising from non-operation under legal relations that the juristic person performs toward the other person which may be private or government agencies, and such function may be the function that it must be made, refrain from action or delivery of the property such as the function to pay the taxes to the government agencies that is responsible for collecting the taxes. It may be the Department of Customs, the IRS, and the Local Administration Organization. If the juristic person does not pay the tax by the due, it is liable to manage the unpaid tax along with its fine and the surcharge by law or if the juristic person is responsible for the payment of bank loan but it does not pay the loan as schedule, it must be liable for payment of the principal debt, unpaid interest and damages because of miss-due of the debt payment as well, or if the juristic person has to deliver the goods sold to the buyer but it cannot deliver the goods, it is liable to pay the compensation for the damages, or the buyer may terminate the contract and demand the seller to pay the compensation including it may be from the potential violation to the rights of others, etc.

However, due to the juristic person is only the ordinary person assumed under the law, the action of the juristic person, indeed, it must be done by the ordinary person which is the representative or the authorized person on behalf of the juristic person. Thus, the civil liability of the juristic person is resulted from the action or omission of the action of the representative or the authorized person on behalf of the juristic person<sup>79</sup>.

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<sup>79</sup> Sudti-autasilp, B. 'Corporate Crime and the Criminal Liability of Corporate Entities in Thailand' (2008) UNAFEI Resource Material Series, 76:94-114.

The main provisions or legislations on civil liability of the juristic person is in the Civil Code, Section 76, paragraph 1<sup>80</sup> which states that “ if the action in relation to the function of the juristic person or the authorized person on behalf of the juristic person, it is to cause the damage to another person, such the juristic person is liable to pay the compensation for the damage, but it does not lose the rights to request for the compensation to the person who has made the damage.”, and in Section 77<sup>81</sup> which states that “let bring the provision of the representative of this code to enforce the involvement between the juristic person and the representative of the juristic person, and between the juristic person or the representative of the juristic person and the external person by adaptation.” When considering the provision of this two sections complied with the characteristics of the operation of the juristic person, it may describe totally as follows;

Firstly, when the desire of the juristic person expressed via its representative of the juristic person, the expression or action of representative of the juristic person as well as the authorized person on behalf of the juristic person. If it is the action in the function of the representative or the commissioner or the authorized person is to perform on behalf of the juristic person and in the scope of the objectives of the juristic person or in the scope of assigned authority on behalf of, it is considered that it is the action of the juristic person. The juristic person shall be obliged to such action. If the damage is occurred to others, the juristic person shall be liable for the compensation to the person who have been damaged by the action.<sup>82</sup>

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<sup>80</sup> The Civil and Commercial Code Section 76, A juristic person is bound to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions, saving its right of recourse against the causers of the damage.

If damage is done to other persons by an act which is not within the scope of the object or power and duties of the juristic person, all the persons as mentioned in paragraph one who agreed such act or executed it, are jointly liable to make compensation.

<sup>81</sup> The Civil and Commercial Code Section 77, The provisions on Agency of this Code shall apply to the relationship between the juristic persons and its representatives, and between the juristic person or its representative and third persons, ‘mutatis mutandis’.

<sup>82</sup> Sudti-autasilp, B. (2008). ‘Corporate Crime and the Criminal Liability of Corporate Entities in Thailand’

Pop (2006)<sup>83</sup> explained the operation of representative of the juristic person which intends on behalf of the juristic person is not different with the action of the representative of the juristic person which acts on behalf of the juristic person. The difference between “representative” and “agent” is the matter of the origin of the representative, the agent, and the matter of the scope of authority. The term of the authorized person on behalf of the juristic person under Civil and Commercial Code, Section 76 paragraph 1 states; “a juristic person is bound to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions, saving its right of recourse against the causers of the damage.” This section is likely to have the wider meaning, not only limiting at only the agent or only the employee of the juristic person. But, to include the person who legally functions or the person who is granted the authorization, directly or by implication to act on behalf of the juristic person in other cases as well, such as the government official who is not considered as the employee or the agent of the government agency. Thus, the subject to the provision of Civil and Commercial, Section 77 shall be applied in the matter of agent to be enforced by adaptation. When considering the provisions on the liability of the juristic person under Section 76, paragraph 1, including Section 77 is the matter of the liability of the culprit to the external person as the main and key examples shown as follows;

The juristic person shall have the obligation to the external person in all affairs that the representative of the juristic person or the authorized person on behalf of the juristic person has made within the scope of objectives of the juristic person or within the scope of authority to be assigned on behalf of any cases.<sup>84</sup>

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<sup>83</sup> Pop, I.A. ‘Criminal Liability of Corporations- Comparative Jurisprudence’ (2006) Individual report, Michigan State University College of Law, 1:26.

<sup>84</sup> Singh, S. ‘Corporate Crime and the Criminal Liability of Corporate Entities’ (2010) Resource Material Series, 76:84-93.

Supreme Court, Decision No. 3648/2549 the Act on Liability for Wrongful Acts of Officials, B.E. 2539 (1996), Section 5 states that “the state agency shall be liable for the result of the wrongful act of its official in the performance of duties to the aggrieved or injured individual. If a wrongful act is caused by an official who does not belong to any state agency, it shall be deemed that the Ministry of Finance shall be held the liable agency under paragraph 1<sup>85</sup>. This section was the matter of the official state agency is liable to the damage party for the consequences of their violating action of its officials on duty. The damage party may sue the government agency directly but it cannot sue the state officials. The case is about the plaintiff as the Police Department sue the action for recourse to the two defendants who were the police officials due to both defendants performed the duty of the representative of the plaintiff which was the juristic person and caused the damages to another person, and the second plaintiff was liable to pay the compensation for the damage under the Civil and Commercial Code, Section 76, paragraph 1<sup>86</sup>.

Supreme Court, Decision No. 2919/2547 when the Office of the Permanent Secretary, Ministry of Science, Technology and Environment which was the juristic person under the affiliation of the Ministry as the second defendant. The first defendant as the regular official under the Ministry of Science, Technology and Environment was also the second defendant. Responding the first defendant drove the caused car in order to perform the duty under the command of the Ministry of Science, Technology and Environment, it was considered that the first defendant also performed the duty under the command of the Ministry of Science, Technology and Environment.

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<sup>85</sup> Charoencheewin, A. ‘The Claim on Compensation for a Wrongful Act of a State Official against a Private Individual ’(2006) (admincourt.go.th) ([http://www.admincourt.go.th/AMC\\_ENG/06-ARTICLE/the\\_claim.pdf](http://www.admincourt.go.th/AMC_ENG/06-ARTICLE/the_claim.pdf)) accessed 10 December 2013.

<sup>86</sup> Ministry of Justice, ‘Petition No. 3648/2549’ (<http://www.library.coj.go.th/n.d.>) <[http://www.library.coj.go.th/pongkun\\_68.php?idmain=194&&kotmaiyo=-&&attra=5](http://www.library.coj.go.th/pongkun_68.php?idmain=194&&kotmaiyo=-&&attra=5)) accessed 13 August 2014.

The second defendant as the affiliated Ministry was liable to pay compensation for such damage. The plaintiff could sue the second defendant<sup>87</sup>.

Supreme Court, Decision No. 5129/2546. Responding the first defendant has taught the subject of physical education of the school was on the official duty on behalf of the representative of the Department of the Education as the second defendant. The command to let the students run around the track field for warming up and the punishment of the students running around the field was also considered as the official duty. When it let Mr. Por die, the second defendant was liable to pay the compensation for the damage to the plaintiff 's mother according to the Act, Section 76, paragraph 1<sup>88</sup>.

Supreme Court, Decision No. 2123/2540. The second defendant made the compromise contract to solve the disputed problem for the first defendant's company, by the second and the third defendants were the members of committee authorized to sign jointly on behalf of the first defendant, but it did not stamp in accordance with the regulation because on that day, it did not bring the company's seal for affixing. But on that same day, Mr. Ror who was a younger brother of Yor and was a member of committee of the first defendant has sent the fax. To Khor, a lawyer of the first defendant in the matter of broker commission of the plaintiff that the first defendant must be paid to the plaintiff as a part of agreement in the compromise contract, the third defendant to the contract knew the buying and selling of the land contract which was the cause basis for the compromise contract to solve the disputed problem.

By this way, when the compromise contract was made for solving the disputed problem between the first defendant and the plaintiff and was in the desire or scope of authorization of the first defendant, and it was considered that the first defendant has achieved the benefit from the compromise contract to solve the disputed

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<sup>87</sup> Supreme Court, Decision No. 2919/2547.

<sup>88</sup> Supreme Court, Decision No. 5129/2546.

problem, This the compromise contract to solve the disputed problem should be effective and obliged to the first defendant. Responding the second and the third defendants who were not the managers and involved in the decision and doing the legal action on behalf of the first defendant or at the committee meeting of the first defendant did not certify this compromise contract to solve the disputed problem, it did not result to let this compromise contract to solve the disputed problem terminate the obligation to the first defendant<sup>89</sup>.

Supreme Court, Decision No. 8560/2538. The first defendant served in the army and performed on the duty of the third defendant by the third defendant was a part of the Supreme Command Headquarters and the Supreme Command Headquarters as a part of the Defence Ministry and as the second defendant. It was considered that the first defendant who was a government official of the third defendant and was also the representative of the second defendant. When the first defendant performed the duty by carelessness causing the damage to the plaintiff, the second defendant was jointly liable with the first defendant under the Civil and Commercial Code, Section 76<sup>90</sup>.

Supreme Court, Decision No. 2590/2537<sup>91</sup>. Even though, the Department of Livestock Development would be the juristic person separated from the Ministry of Agriculture and Cooperatives as the third defendant, but the second defendant was a part of government sector directly belonged to the command of the third defendant by the Revolutionary Council No. 216, Article No. 13 and 14 which was revised. When the first defendant performed the duty by carelessness causing the damage to the plaintiff, the second defendant must be liable to pay the compensation for damages under the Civil and Commercial Code, Section 76.

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<sup>89</sup> Department of Civil Litigation, 'Petition No. 2123/2540' (<http://www.civil.ago.go.th/n.d>) ([http://www.civil.ago.go.th/images/civil6/deega/Deega47\\_2919.pdf](http://www.civil.ago.go.th/images/civil6/deega/Deega47_2919.pdf)) accessed 13 August 2014.

<sup>90</sup> Ministry of Justice, 'Petition No. 8560/2538' (<http://www.library.coj.go.th/n.d>) ([http://www.library.coj.go.th/pongkun\\_68.php?idmain=194&&kotmaiyo=-&&mattra=5](http://www.library.coj.go.th/pongkun_68.php?idmain=194&&kotmaiyo=-&&mattra=5)) accessed 13 August 2014.

<sup>91</sup> Supreme Court, Decision No. 2590/2537.

In such case, it could be analyzed that the example of the case ruled under this Section 76, it was always the case involved with the government sector due to the guideline of the Supreme Court ruling, it was not considered that the government official was the agent or employee but it was as the authorized person performing under the Civil and Commercial Code, Section 76, paragraph 1, it should take this section for applying. If it was the case of the juristic person which was the private organization or state agency which was the state enterprise, it was considered that the staff as the employee or the agent, if it caused the damage to the other persons by violation, it would take the special provision of the violation in the matter of the employer or the causer must be liable for the consequence of violation that the employee or the agent have made in terms of hiring or being assigned depending on the case, it did not take the Section 76 as the general provision to be applied.

Also, when the Act on Liability for Wrongful Acts of Officials, B.E. 2539 (1996) was enforced, there would not be no case for suing the government sector and the officials to be jointly liable for the consequences of violation of the officials due to this law did not specify the criteria for prosecuting and claiming the damages different from the criteria of violation in the Civil and Commercial Code, by if the officer violated on duty, the victim must sue for the compensation from the government agency only. It would not be able to sue for claiming against the violated official and on the other hand, if the action of violation of the official did not act on duty, the victim must sue for claiming against the official directly. It could not sue the government agency..

#### 2.2.2.2 Criminal Liability

Theoretically, there is an argument whether the juristic person shall have the criminal liability or not The party that has agreed the juristic person shall be liable to the criminal liability provides several reasons such as;

When the juristic person has the rights and functions, it may have the intention and the action as the ordinary person via the authorized representative on

behalf of. If such action has the law legislated that it is the criminal liability, the juristic person will be guilty and is condemned as the criminal case<sup>92</sup>.

If the action of the juristic person is the action within the scope of objectives of the juristic person for the benefit of the juristic person, if having the law legislated that it is the criminal offense, it is considered that such the juristic person is guilty with the criminal penalties to the juristic person as a way to strengthen and control the juristic person for the benefit of members of the juristic person and the general public, etc.<sup>93</sup> The party that expresses the juristic person shall not have criminal liability provides the reasons as well such as (1) When the juristic person has the characteristics as the supposed person by the law with no real identity, and no living soul, cannot express the intention which is the key element of the criminal law because it is contrary to the condition of the juristic person<sup>94</sup>. (2) The juristic person shall perform the affairs under the legal rights and functions or according to the registered objectives which the rights, functions and such objectives shall be lawful. It may not have the rights, functions, or objectives that violate the law which is the offence to the criminal law<sup>95</sup>. (3) The objectives or the concept of criminal penalty whether it will be for replacement according to the retribution, for deterrence, for reformation or for cutting off the chance for another offense (incapacitation) are all aimed at the use for the ordinary person who commits the offense. It does not refer to the juristic person, etc.<sup>96</sup>

due to the actions of the juristic person, it can be divided into 4 types<sup>97</sup>;

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<sup>92</sup> Pop, I.A. (2006).

<sup>93</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " American Criminal Law Review.: 44.

<sup>94</sup> Chalunda, H.M. 'Corporate Crime and the Criminal Liability of Corporate Entities in Malawi' (2008) Resource Material Series, 76:66-72.

<sup>95</sup> Robinson, A. A., "Corporate Culture as a Basic for the Criminal Liability of Corporations ".

<sup>96</sup> C. DeMaglie, "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review (2005): 547-551.

<sup>97</sup> Divided by author.

Firstly, the penalty that affects the life of the offender. This penalty includes the death penalty to the offender. This penalty applies only to the very serious offense or which affects the public peacefulness or good moral of the people. By this way, Keith (2010)<sup>98</sup> explained, it is for to satisfy the seriousness of the offense, cutting off the offense which has the inborn trait as the criminal offender from society, permanently, and restrain the evil of those who think to do the offense. It has noted that many countries have abolished the death penalty due to the humanitarian reason and the death penalty does not reduce the serious offence. It also may cause the offender to the death penalty but it is not arrested will perform the offence without fear of penalty because anyhow the first offense is already punished by death penalty. But, many countries including Thailand continues to use the death penalty.

Secondly, the penalty that impacts on the liberty of the offender. This penalty includes imprisonment and detention by aiming to temporarily cut off the offender from the society (In case of imprisonment with having schedule and detention) or permanently (In case of life imprisonment), and settling such period to bend the character of the offender before returning to society. The imprisonment is to bring the offender for control in prison and under close supervision of the state authorities. It often uses with the serious offense or the offense that very much violates the moral order of society or the society peacefulness. The detention penalty shall be detained the offender in a defined location such as the home of the offender itself etc., it is often applied to the light offender<sup>99</sup>.

Thirdly, the penalty that affects the normal life of the offender. This penalty includes to work for society (Community service) in the matters with an aim to

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<sup>98</sup> N. Keith, "Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility" *Business Law International*, 2010), pp. 247-276.

<sup>99</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " *American Criminal Law Review*, : 44.

provide the offender with no criminal intention has become aware of its action and chastening. This punishment is not applied only the ordinary person but also for the juristic person as the offender especially in the case involving the environmental case such as to order the juristic person to eliminate the pollution it releases or by paying for supporting the environmental protection agency, etc. For Thailand, this measure is not considered as the penalty but it may be applied on the behavioral control if the court will not punish the offender<sup>100</sup>.

Fourthly, the penalty that affects the property of the offender. This penalty includes the fine and confiscation of the offender. The fine is a penalty imposed against the property of the offender by the court. It is usually defined as the exact amount of the fine which is commonly applied for the non-violent offense. But, the determination of penalty with high rate will apply to the economic offense or the offense made by the juristic person such as the offenses relating to trading securities, the confiscation and forfeiture of property that are intended to be the offenses or apply for the offense or derived from the offence in order to not let perform the offence or gains the benefit of the property for no longer such drug abuse offence or economic crimes, etc.<sup>101</sup>

However, under the current Thai law, it is quite acceptable that the juristic person has the criminal liability by showing the intention and the action via the representative or agent of the juristic person. It remains the problem that how the action of criminal offense the juristic person may perform the offense or which criminal offense the juristic person may not perform the offense. It may be separated for consideration and conclusion as follows;

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<sup>100</sup> Keith, N., "Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility."

<sup>101</sup> Robinson, A.A. 'Corporate Culture as a Basic for the Criminal Liability of Corporations' (2008) (f the United Nations Special representative of the Secretary General for Business and Human Rights) (Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf ).

- (1) The legislated law, particularly the criminal offense of the juristic person. There are many laws that contain the provisions for letting the juristic person have the criminal liability especially the laws regulating the business operation<sup>102</sup>, for example; Financial Institution Business Act, B.E. 2551 (2008), it contained the provisions of criminal penalties to the financial institution in Section 122, 124, 125 and 128<sup>103</sup>.

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<sup>102</sup> Chalunda, H.M. 'Corporate Crime and the Criminal Liability of Corporate Entities in Malawi' (2008) Resource Material Series, 76.

<sup>103</sup> Financial Institution Business Act, B.E. 2551 (2008)

Section 122, Any financial institution which violates or fails to comply with Section 11 shall be liable to a fine not exceeding one hundred thousand Baht, and to a further fine not exceeding one thousand Baht per day for every consecutive day during which such violation continues.

Section 124, Any financial institution which violates or fails to comply with Section 13, the first paragraph of Section 15, Section 37, Section 81 or Section 82, or violates or fails to comply with notifications, stipulations or rules prescribed by virtue of the second paragraph of Section 15, the first paragraph of Section 26, Section 37 or Section 82 shall be liable to a fine not exceeding three hundred thousand Baht and to a further fine of not exceeding three thousand Baht per day for every consecutive day during which such violation continues or until rectification has been made.

Section 125 Any financial institution which violates or fails to comply with Section 20, the first paragraph of Section 21, Section 22, Section 38, the first paragraph of Section 40, Section 41, Section 44, Section 47 or Section 84, or violates or fails to comply with notifications, stipulations or rules prescribed by virtue of Section 38, Section 39, the second paragraph of Section 40, Section 41, Section 46, Section 47 or Section 84 shall be liable to a fine not exceeding five hundred thousand Baht and to a further fine of not exceeding five thousand Baht per day for every consecutive day during which such violation continues or until rectification has been made.

Section 128, Any financial institution violates or fails to comply with Section 16, Section 24, the first paragraph of Section 25, Section 29, Section 30, Section 31, Section 32, Section 34, Section 35, Section 36, Section 43, Section 48, Section 49, Section 50, Section 51, Section 58, Section 59, Section 60, Section 61, Section 62, Section 63, Section 64, Section 66, Section 67, Section 68, Section 71, the first paragraph of Section 73, Section 74, Section 78, Section 80, Section 93, Section 94 or Section 95, or violates or fails to comply with notifications, stipulations, rules, conditions or orders prescribed by virtue of Section 9, the first paragraph of Section 10, Section 16, Section 29, Section 30, Section 31, the first paragraph of Section 32, Section 33, Section 34, Section 35, Section 36, Section 42, Section 43, Section 48, Section 49, Section 50, Section 51, Section 58, Section 59, Section 60, Section 61, Section 62, Section 63, Section 64, Section 66, Section 67, Section 71, the first paragraph of Section 73, the second paragraph of Section 74, Section 78, Section 80, Section 89, Section 90 (1), (3) and (4), Section 95 or Section 96 shall be liable to a fine not exceeding one million Baht and a further fine of not exceeding ten thousand Baht per day for every consecutive day during which such violation continues or until rectification has been made.

The Multimodal Transport Act, B.E. 2548 (2005), contained the provisions of punishing the multimodal transport entrepreneur which registered under Section 71 to 75<sup>104</sup>.

Credit Information Business Act, B.E. 2545 (2002), contained the provisions of criminal liability to the Credit Information Company under Section 42, 44, 46, 47, 51, 55, 56 and 59<sup>105</sup> with having the financial institution penalty provisions

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<sup>104</sup> The Multimodal Transport Act, B.E. 2548 (2005)

Section 71, Any registered multimodal transport operator who does not comply with Section 43 or Section 47 paragraph two or violates order suspending his operation under Section 57 paragraph two shall be subject to punishment by fine from Baht Fifty Thousand to Baht Five Hundred Thousand and additional fine of Baht Three Thousand per day as long as the violation continues.

Section 72, Any registered multimodal transport operator who does not comply with the conditions stipulated in the registration certificate under Section 41 paragraph five, Section 44 paragraph one, Section 45 paragraph five or Section 48 paragraph five shall be subject to punishment by fine not exceeding Baht Two Hundred Thousand.

Section 73, Any registered multimodal transport operator who does not comply with Section 52 or Section 56 shall be subject to punishment by fine not exceeding Baht Fifty Thousand.

Section 74, Any registered multimodal transport operator who does not comply with Section 60 or Section 61 shall be subject to punishment by fine not exceeding Baht Ten Thousand.

Section 75, Any registered multimodal transport operator who does not comply with Section 53 or Section 54 shall be subject to punishment by fine not exceeding Baht Five Thousand.

<sup>105</sup> Credit Information Business Act, B.E. 2545 (2002)

Section 42, Any Credit Information Company who fails to comply with Section 7, Section 8 or Section 16, shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 per day during the period of failure to comply or until the correction is made.

Section 44, Any Credit Information Company, Information Controller, or Information Processor who violates Section 10 or Section 12 shall be subject to imprisonment of five to ten years, or fine of not exceeding Baht 500,000 or both.

Section 46, Any Credit Information Company, Information Controller, or Information Processor who violates Section 13 shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 per day during the period of failure to comply or until the correction is made.

Section 47, Any Credit Information Company or Information Processor who fails to comply with the first paragraph of Section 17, or fails to comply with rules, procedures and conditions prescribed by the Committee in the second paragraph of Section 17, shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 a day during the period of in compliance or until the correction is made.

Section 51, Any Credit Information or Information Processor who discloses or provides Information to their Member of Recipient of Service for the benefit otherwise than, or discloses or provides Information to other persons apart from those prescribed in Section 22, shall be subject to imprisonment of up to five years, or fine of not exceeding Baht 500,000 or both.

Section 55, Any Credit Information Company or Member who fails to comply with Section 26 shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 per day during the period of violation or until correction is made.

in Section 57. And Emergency Decree on Asset Management Company, B.E. 2540 (1997), contained the provisions of criminal penalty to the asset management company in Section 13<sup>106</sup>.

Including Emergency Decree on the Specific Purpose juristic person for Securitization, B.E. 2540 (1997), contained the provisions of criminal penalties to the specific juristic person in Section 34<sup>107</sup>.

Public Limited Company Act, B.E. 2535 (1992), contained the provisions of criminal penalty to the public company under Section 191, 200, 201, 205, 206, and 208<sup>108</sup>.

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Section 56, Any Credit Information Company, Financial Institution, Member or Recipient of Service who fails to comply with Section 27 shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 per day during the period of violation or until correction is made.

Section 59, Any Credit Information Company who violates or fails to comply with rules, procedures and conditions determined by the Committee under Section 40 shall be subject to fine of not exceeding Baht 300,000 and fine of not exceeding Baht 10,000 per day during the period of violation or until the correction is made.

<sup>106</sup> Emergency Decree on Asset Management Company, B.E. 2540 (1997), Section 13 Any asset management companies which report untrue transactions in their books of accounts, adjust the books of accounts or document relevant to accounting in order to distort the truth, neglect to record transactions in books of accounts, fail to prepare books of accounts to exhibit assets and liabilities described in the first paragraph of Section 11, fail to submit report, document, and explanation required by the Bank of Thailand, or disclose the untrue expressions under the second paragraph of Section 11 shall be liable to a fine not exceeding Baht 300,000.

In the case where any asset management companies shall be liable to imprisonment for a term not exceeding Baht 300,000, or both, unless he can prove that he had no part in the commission of such offense of the asset management companies.

<sup>107</sup> Emergency Decree on the Specific Purpose juristic person for Securitization, B.E. 2540 (1997), Any Specific Purpose juristic person who violates Section 13 shall be liable to fine of not exceeding Baht 300,000.

<sup>108</sup> Public Limited Companies Act, B.E. 2535 (1992)

Section 191 Any company which fails to comply with Section 11, Section 25, Section 31 paragraph two, Section 40, Section 48, Section 51, Section 55 paragraph one, Section 58, Section 59, Section 62 paragraph two, Section 63 paragraph two, Section 64, Section 65 paragraph three, Section 108 paragraph two, Section 127, Section 133, Section 138 paragraph two, Section 142, Section 143, Section 145 paragraph two, Section 188 or Section 189 shall be liable to a fine not exceeding twenty thousand Baht.

Section 200 Any company which fails to comply with Section 61, Section 62 paragraph one, or Section 96 paragraph one shall be liable to a fine not exceeding fifty thousand Baht.

Section 201 Any company which violates Section 66 shall be liable to a fine not exceeding fifty thousand Baht or two times the value of shares held or pledged, whichever is higher.

Life Insurance Act, B.E. 2535 (1992), contained the criminal penalty provisions to the life insurance company under Section 89, 90, 93, 94, 99, 100 and 102<sup>109</sup>.

Trade Association Act, B.E. 2509 (1966), contained the provisions of penalty to the trade association under Section 47 and 48<sup>110</sup> and Act Determining

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Section 205 Any company which fails to comply with Section 109 shall be liable to a fine not exceeding two hundred thousand Baht and an additional daily fine of two thousand Baht, until the failure is corrected.

Section 206 Any company which fails to comply with Section 110, Section 111, or Section 137 shall be liable to a fine not exceeding twenty thousand Baht.

Section 208 Any company which fails to make rectification pursuant to the order of the Registrar given under Section 132(3) shall be liable to a fine not exceeding fifty thousand Baht.

<sup>109</sup> Life Insurance Act, B.E. 2535 (1992)

Section 89 Any company which violates or fails to comply with the provisions of the fifth paragraph of Section 8, Section 9, Section 10, Section 11, Section 17, Section 21 or fails to comply with the conditions prescribed by the Minister under the fourth paragraph of Section 7, the first paragraph of Section 8 or the conditions prescribed by the Insurance Commissioner under the second paragraph of Section 33 (9), or the second paragraph of Section 34 shall be liable to a fine from Baht 20,000 up to Baht 200,000, and to a further fine not exceeding Baht 10,000 per day for every consecutive day during which such violation continues.

Section 90 Any company which fails to inspect the register of shareholders, or inform its shareholders failing to comply with Section 12 shall be liable to a fine from Baht 10,000 up to Baht 50,000, to a further fine not exceeding Baht 5,000 per day for every consecutive day during which such violation continues.

Section 93 Any company which violates or fails to comply with provisions under Section 23, Section 28, Section 33, Section 34, Section 35, Section 36, Section 37, Section 53, Section 54, or fails to place the reserve fund under Section 24, or fails to comply with the provisions as prescribed by the Minister in the notification under Section 38, shall be liable to a fine not exceeding Baht 500,000 and to a further fine not exceeding Baht 20,000 per day for every consecutive day during which such violation continues.

Section 94 Any company violates the provisions of Section 25 shall be liable to a fine not exceeding Baht 50,000.

Section 99 Any company which fails to allow interested persons to inspect register books or fails to provide a certified copy of such register as interested persons request under Section 42, shall be liable to a fine not exceeding Baht 5,000.

Section 100 Any company which willfully gives a false statement, or conceals a fact to be informed while submitting particulars, or informed under Section 45, shall be liable to a fine from Baht 20,000 up to Baht 100,000.

Section 102 Any company which fails to comply with the provisions of Section 51 shall be liable to a fine not exceeding Baht 100,000.

<sup>110</sup> Trade Association Act, B.E. 2509 (1966)

Section 47 Any trade association which refuses to allow its member to examine the activities and property of such trade association under section 20 shall be liable to a fine of not more than one thousand Baht.

Offences Relating to the Register Partnership, Limited Partnership, Limited Company, Association, and Foundation, B.E. 2499 (1956), which was the law with the provisions of criminal penalties of the juristic person, authorized person of the juristic person and related people with those juristic persons<sup>111</sup>.

- (2) The law that imposes the criminal penalty does not determine to punish any specific juristic person but it is the case considered as the juristic person may perform the offense and must assume the criminal liability<sup>112</sup>.

This case may compare with the matter of the rights and functions of the juristic person under the Civil and Commercial Code, Section 67<sup>113</sup>, in the subject of the rights and functions of the juristic person, which can be mainly considered that the rights and functions of the juristic person may perform the offense and must assume the criminal liability. The provisions of law with criminal penalties will not specify obviously that the offender is the company or the juristic person mentioned above. It may be used only as “anyone” or “entrepreneur” or “employer” who, by nature, performs such offense, the offender may be the ordinary person or the juristic person, but in prosecuting the criminal charges against the juristic person will often sue the ordinary person. It also performs together with the juristic person due to the action of the juristic person must have the ordinary person who is the representative or the agent always performing the action<sup>114</sup>, for example

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Section 48 Any trade association which violates section 22 or section 23 shall be liable to a fine of not more than fifty thousand Baht.

<sup>111</sup> Act Determining Offences Relating to the Register Partnership, Limited Partnership, Limited Company, Association, and Foundation, B.E. 2499 (1956).

<sup>112</sup> Robinson, A.A. ‘Corporate Culture as a Basic for the Criminal Liability of Corporations’ (2008)(the United Nations Special representative of the Secretary General for Business and Human Rights) (Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf ).

<sup>113</sup> Thailand Civil and Commercial Code, Section 67 Subject to Section 66 A juristic person enjoys the same rights and is subject to the same duties as a natural person, by reason of their nature, may only be enjoyed or incurred only by a natural person.

The Offences of Cheating Fraud under the Criminal Code, Section 341<sup>115</sup>.

Supreme Court, Decision No. 6825/2541<sup>116</sup> The second defendant intended the fraud since he had made the agreement of contract jointly with the plaintiff without disclosing the fact that the transfer of the claiming rights under the contract of buying and selling the colour television sets which should notify the person on behalf of the plaintiff for acknowledgement. This was in order to let the person behalf of the plaintiff be naive that the first defendant's company had the rights to receive the payment from the buyer which was the normal practice of trading, which was the trick of the second defendant and it was deceptive, and by such deception, the asset in forms of such colour television sets were received from the plaintiff which were transformed into the rights to receive the payment of 13,000,000 baht and its fractions.

This was the offense under the Criminal Code, Section 341. The second defendant was the performer would be liable for the action in accordance with the Criminal Code, Section 83<sup>117</sup>. The Offences of Mischeif under the Criminal Code, Section 360<sup>118</sup>.

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<sup>114</sup> Robinson, A.A. 'Corporate Culture as a Basic for the Criminal Liability of Corporations' (2008) (the United Nations Special representative of the Secretary General for Business and Human Rights) (Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf).

<sup>115</sup> The Criminal Code, Section 341, Whoever, dishonestly deceives a person with the assertion of a falsehood or the concealment of the facts which should be revealed, and, by such deception, obtains a property from the person so deceived or a third person, or causes the person so deceived or a third person to execute, revoke or destroy a document of right, is said to commit the offence of cheating and fraud, and shall be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht, or both.

<sup>116</sup> Supreme Court, Decision No. 6825/2541(lawdd.net) <<https://www.lawdd.net> ) accessed 10 August 2014.

<sup>117</sup> The Criminal Code, Section 83 In case of any offence is accrued by commission of the person as from two persons upwards, such accomplices deemed to be principals shall be punished as provided by the law for such offence.

<sup>118</sup> The Criminal Code, Section 360 Whoever, damaging, destroying, causing the depreciation of value or rendering useless the property used or possessed for public benefit, shall be imprisoned not out of five years or fined not out of ten thousand Baht, or both.

Supreme Court, Decision No. 392/2544<sup>119</sup>. Even though, the government sector did not use the disputed land that has been provided to be the public benefit for constructing the bridge across the river according to the desire of the provider. It did not let both defendants exist the rights to intrude into the disputed land for construction of the buildings or building the harbor in the Chao Phraya River without permission. Even the constructed buildings would be demolished, it did not let the occurred and succeeded mistake to be unmistakable. The action of the second defendant's company that was made, the first defendant who was a member of the committee must be liable in personal status as well. Both defendants would be liable to the Land Code, Section 108 bis, paragraph 2 and the Criminal Code, Section 360.

The Offences under the Act relating to Offence Arising from the Use of Cheque Act, B.E. 2534 (1991), Section 4<sup>120</sup>.

Supreme Court, Decision No. 6064/2545<sup>121</sup>. The first defendant was the limited company, the desire or intention expressed by the representative of the juristic person was the second defendant who was the authorized person on behalf of the first defendant. Thus, when the first defendant provided the two cheques in order to pay the

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<sup>119</sup> The Revenue Department, 'Petition No. 392/2544' (<http://www.rd.go.th/n.d>) <<http://www.rd.go.th/publish/2959.0.html>> accessed 13 August 2014.

<sup>120</sup> Offence Arising from the Use of Cheque Act, B.E. 2534 (1991), Section 4 Whoever issues a cheque for the payment of an existing and legally enforceable debt, with any of the following natures or acts:

- (1) intending that payment of such cheque shall not be made;
- (2) having no funds in the account payable at the time such cheque is issued;
- (3) making order for payment higher than the funds in the account payable at the time such cheque is issued;
- (4) withdrawing the funds in whole or in part from the account payable to cheque, to the extent that the amount is insufficient to meet such cheque;
- (5) making dishonest order to a banker not to pay such cheque.

When the cheque is legally presented for payment, if a banker refuses to pay such cheque, the drawer is said to commit an offence, and shall be punished with fine not exceeding sixty thousand Baht or imprisonment not exceeding one year, or both.

<sup>121</sup> Supreme Court, Decision No. 6064/2545.

debt for goods which was the real existed debt and enforceable by law, by the second defendant signed the payment order affixed the seal of the first defendant's company. This was obviously seen that the second defendant performed both as the personal status and as the authorized person on behalf of the first defendant. It was the action jointly performing the offense, the second defendant might not claim that there was no intention to provide the disputed cheque. According to Sections 96, 97 and 98 of Social Security Act, B.E. 2533 (1990)<sup>122</sup> specify the punishments for an employee. According to Section 5 paragraph 2, "employer" refers to a person who employs and pays an employee(s) as well as authorizes a person(s) to take an action(s). If the employer is a juristic person, then it will include the juristic person's representative(s)<sup>123</sup>. Therefore, an employer may be either an individual or a juristic person.

- (3) In case of a criminal offense(s) (e.g. murder and falsity) that cannot be committed by a juristic person, only an individual(s) can commit the criminal offense(s). Some criminal offenses such as negligence are

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<sup>122</sup> Social Security Act, B.E. 2533 (1990)

Section 96 Any employer who intentionally does not submit the form to the Office within the time prescribed under section 34 or does not declare in writing to the Office any changes or additional modifications of the records within the time prescribed under section 44 shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding twenty thousand Baht or to both.

If an offence under paragraph one is committed continually, the offender shall be liable to an additional fine not exceeding five thousand Baht per day throughout the period of violation or non-compliance.

Section 97 Any employer who submits the form prescribed under section 34 or a written request for modifications or amendments to the form prescribed under section 44 by intentionally filing out false statements in such form or substituting false statements for modifications or amendments in such written request shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding twenty thousand Baht or to both.

Section 98 Any person who obstructs or does not provide reasonable facilities to the competent official who is performing the duties under section 80 shall be liable to imprisonment for a term not exceeding one month or to a fine not exceeding ten thousand Baht or to both.

<sup>123</sup> Social Security Act, B.E. 2533 (1990), Section 5 paragraph 2, "employer" means a person agreeing to accept an employee for work by paying him or her wages, and includes a person entrusted by an employer to act on his or her behalf, in the case an employer is a juristic person, it shall include the person authorized to act on behalf of such juristic person and the person entrusted by such authorized person to act thereon.

questionable. However, a decision of the Supreme Court Decision decided that a juristic person had the liability for negligence in the case of a gas truck accident in 1990<sup>124</sup>.

Supreme Court, Decision No. 3446/2537. A prosecutor was a plaintiff suing the company as the first defendant owning the gas truck and its managing director as the second defendant for taking a wrongful action against the 28th announcement (B.E. 2514) of Revolutionary Council<sup>125</sup> that was a negligent action causing death, serious injuries, fire and dangers. Under Civil and Criminal Code, Sections 225, 291 and 300<sup>126</sup>, it was concluded the employee of the first defendant drove the gas truck that turned over and then caused fire as well as killed and injured the other people. The driver was also killed in the accident.

The Supreme Court concluded that the gas truck of the first defendant did not have a license and was not checked by the Department of Public Works. Although, the accident was partially caused by the negligence of the employee of the first defendant, the first defendant did not comply with relevant laws. Hence, the first defendant's actions were negligent and wrongful. The first defendant solely had all executive powers and could control the company in place of the first defendant. Nevertheless, the second defendant did not make the gas truck to conform to the laws. Thus, the actions of the second defendant were also wrongful<sup>127</sup>. Noticeably, the Supreme Court judged that the first defendant's negligent actions caused the accident.

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<sup>124</sup> Supreme Court, Decision No. 3446/2537.

<sup>125</sup> Revolutionary Party Decree No. 28, B.E. 2514 (1971), Considering containing of LPG which is a hazardous fuel possible causing fire accident due to probable careless act as well as the equipment, device of venue used does not meet safety standard eventually a code to control the LPG containing ought to be imposed so as to avoid a cause of fire accidents and the danger to lives and assets of public.

<sup>126</sup> See Footnote No. 25

<sup>127</sup> Analyzed by the case of the Supreme Court, Decision No. 3446/2537.

The first defendant must have the liability for its actions, not the drivers' actions. Nonetheless, a juristic person can only be fined and forfeited; while an individual can also be executed, imprisoned or confined<sup>128</sup>.

Considering the reason that the corporate should be punished by criminal law. In general, a juristic person is not an individual. In other words, a juristic person refers to a group of people or properties with legal rights and duties similar to an individual. However, the juristic person cannot have particular rights and duties of the individual such as marriage right and military service duty<sup>129</sup>. Nonetheless, the juristic person can have other rights such as contract making right. If the juristic person violates criminal laws, then it may be punished<sup>130</sup>. Nevertheless, the juristic person cannot be imprisoned or executed. The juristic person can exist under the Civil and Commercial Code or other laws such as acts. The rights and duties of the juristic person must be under the laws that permit the juristic person to be established as well as the scope of its objectives. For example, a commercial company does not have rights and duties that are not for commercial purposes<sup>131</sup>.

However, after the juristic person is established, its status will be different from an individual as stated in Supreme Court, Decision No. 1233/2505. According to the decision, although the temple was a juristic person, it could be considered as a witness<sup>132</sup>. Most juristic persons exist under the Civil and Commercial

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<sup>128</sup> *Ibid.*

<sup>129</sup> M. Hsiao, "The Shift in China from Corporate Crime to the Crime of Corporate Manslaughter: Comparisons with the United Kingdom and Australia.," Journal of Business Law, 1 (2015): 68-83.

<sup>130</sup> M., M., "Corporate Criminal Liability: Article 10 the Convention against Transnational Organized Crime," Journal of International Affairs: 66(61).

<sup>131</sup> Hetzer, W., "Corruption as Business Practice? Corporate Criminal Liability in the European Union " European Journal of Crime, Criminal Law and Criminal Justice,

<sup>132</sup> See Supreme Court, Decision No. 1233/2505, Thai Language Version, ([http://www.lawreform.go.th/lawreform/images/thjud/ththsc/2505/cd\\_1594.htm](http://www.lawreform.go.th/lawreform/images/thjud/ththsc/2505/cd_1594.htm)).

Code. According to Section 72<sup>133</sup> of the code, juristic persons include politic bureaus, temples, registered partners, limited companies, associations and foundations<sup>134</sup>. Besides, Civil and Commercial Code, Section 73<sup>135</sup> states that politic bureaus comprise of the ministries and departments of local and municipal governments. Accordingly, the ministries and departments do not include the government itself as stated in Supreme Court, Decision No.724/2490<sup>136</sup>, which decided that the government was not a juristic person. Therefore, the government could not be a litigant. The local governments also include provincial governors (Supreme Court, Decision No. 544/2475<sup>137</sup>), but not include provincial and district committees under the National Government Organization Act, B.E. 2534 (1991) (Supreme Court, Decision No. 1061/2497<sup>138</sup>). Moreover, municipal governments include municipalities (Supreme Court, Decision No. 538/2493<sup>139</sup>). The juristic person cannot declare its intentions or desires as an individual. However, Section 75 of the Civil and Commercial Code states that the intention(s) of a juristic person can be declared by its representative(s)<sup>140</sup>.

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<sup>133</sup> Thailand Civil and Commercial Code, Section 72 The change of representatives of juristic person or of any restriction, or modification of the power of representatives shall be effective after having complied with the law, regulations or its constitutive act, but cannot be set up against third person acting in good faith.

<sup>134</sup> Sudti-autasilp, B. (2008). 'Corporate Crime and the Criminal Liability of Corporate Entities in Thailand'.

<sup>135</sup> Thailand Civil and Commercial Code, Section 73 If a vacancy occurs among the representatives of juristic person, and there is reason to believe that damage might ensure from delay, the Court may, on the application of any interested person or of the Public Prosecutor, appoint a temporary representative.

<sup>136</sup> See Supreme Court, Decision No. 724/2490, Thai Language Version, (<http://www.deka.in.th/view-50151.html>).

<sup>137</sup> See Supreme Court, Decision No. 544/2475, Thai Language Version, <<http://www.deka.in.th/view-258351.html>>.

<sup>138</sup> See Supreme Court, Decision No. 1061/2497, Thai Language Version, <<http://www.deka.in.th/view-50627.html>>.

<sup>139</sup> See Supreme Court, Decision No. 538/2493, Thai Language Version, <<http://www.deka.in.th/view-52290.html>>.

<sup>140</sup> Thailand Civil and Commercial Code, Section 75 If, in the case under Section 74, it causes a non-existence of the representatives of juristic person, or number of the remaining representatives cannot

Therefore, a “representative” is different from an “agent” according to Section 797 of Civil and Commercial Code<sup>141</sup>. This is because the term, “representative”, refers to a person who declares a juristic person’s intentions according to Section 75 of Civil and Commercial Code. That is, the representative is required for the juristic person that wants to declare its intentions. However, an “agent” is a person who is authorized to take actions for other person or principal. Put differently, the principal can declare its intentions, but the principal chooses to authorize the agent to do so. The Supreme Court, Decision No. 1808/2494<sup>142</sup> explains that two committees were authorized to take juristic acts for their company. Hence, the two committees can be considered as representatives under Section 75, not agents under Section 801<sup>143</sup>.

According to the Civil and Commercial Code, there are various types of agents such as explicitly appointed agents, ostensible agents (Section 797<sup>144</sup>), private

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constitute quorum of the meeting or is sufficient to execute such matter, if it is not otherwise provided by the law, or defined in its regulations or constitutive act, the provisions of Section 73 shall apply to the appointment of special representatives, *mutatis mutandis*.

<sup>141</sup> Thailand Civil and Commercial Code, Section 797 Agency is a contract whereby a person, called the agent, has authority to act for another person, called the principal, and agrees so to act.

Agency may be express or implied.

<sup>142</sup> See Supreme Court, Decision No. 1808/2494, Thai Language Version, (<http://www.deka.in.th/view-52064.html>).

<sup>143</sup> Thailand Civil and Commercial Code  
Section 75 See Footnote No. 131.

Section 801 The agent who has a general authority may do all acts of management on behalf of his principal.

He cannot do such acts as:

- (1) Selling or mortgaging immovable property.
- (2) Letting immovable property for more than three years.
- (3) Making a gift.
- (4) Making a compromise
- (5) Entering an action in Court.
- (6) Submitting a dispute to arbitration.

<sup>144</sup> See Footnote No.132

agents (Section 821, 822<sup>145</sup>), and agents by ratification (Section 823<sup>146</sup>). To appoint the explicitly appointed agents or agents by ratification, a juristic person must declare its intentions or ratify through its representative(s) as stated in Section 75. To appoint ostensible or private agents, the representative(s) is not needed. For instance, a company's representatives must be its two committees. To take actions in the name of the company, the representatives must affix its company's seal. If a representative takes an action in the name of its company or the two representatives take the action without affixing its company's seal, then the representative(s) will not be considered as agent(s) under Section 75. However, the representative(s) can be considered as an ostensible agent(s). Examples of decisions are given below<sup>147</sup>.

Supreme Court, Decision No. 955/2510<sup>148</sup>. A partnership the manager signed its name on a contract without affixing the partnership's seal. The partnership, not the manager, must be responsible for this action.

Supreme Court, Decision No. 853/2512<sup>149</sup>. A juristic person's representative made a contract in the name of the juristic person. The contract must oblige the juristic person.

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<sup>145</sup> Thailand Civil and Commercial Code

Section 821 A person who holds out another person as his agent or knowingly allows another person to hold himself out as his agent, is liable to third persons in good faith in the same way as such person was his agent.

Section 822 If an agent does an act in excess of his authority, but the third person has reasonable grounds, arising from the act of the principal, to believe that it was within his authority, the provisions of the foregoing section apply correspondingly.

<sup>146</sup> Thailand Civil and Commercial Code, Section 823 If an agent does an act without authority or beyond the scope of his authority, such act does not bind the principal unless he ratifies it.

<sup>147</sup> S. Rose-ackerman, "Corruption and the Criminal Law," Forum on Crime and Society, 2(1) (2002): 3-21.

<sup>148</sup> See Supreme Court, Decision No. 955/2510, Thai Language Version, <<http://www.deka.in.th/view-34487.html>>.

<sup>149</sup> See Supreme Court, Decision No. 853/2512, Thai Language Version, <<http://www.deka.in.th/view-38655.html>>.

Supreme Court, Decision No. 362/2512<sup>150</sup>. Although, the juristic person's managing director made a hire-purchase contract in the name of the juristic person with a defendant without affixing the juristic person's seal, the juristic person was considered a party in the contract (Supreme Court, Decision No. 782/2516 is also similar to this decision<sup>151</sup>).

Supreme Court, Decision No. 1309/2515<sup>152</sup>. A company's regulations stated that its managing directors can sign in the name of the company, but they must affix the company's seal. After the company hired a plaintiff without affixing the seal as well as accepted and paid for the plaintiff's works, the company had obligations with the plaintiff.

Supreme Court, Decision No. 1709/2516<sup>153</sup>. The chairperson of a foundation signed on a lease termination agreement, while the other two committees did not sign their names. It shows that the chairperson took the action as an agent of the foundation. Thus, the termination was effective. Even though, the above decisions, except for the Supreme Court, Decision No. 1709/2516, did not provide reasons for the juristic persons' obligations, the obligations came from the actions of their agents.

If any person cannot be considered as an ostensible or private agent, then the person's actions (this does not include the representative(s) stated in Section 75) will not oblige with his or her juristic person as stated in the Supreme Court, Decision No.

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<sup>150</sup> See Supreme Court, Decision No. 362/2512, Thai Language Version, (<http://www.deka.in.th/view-38575.html>).

<sup>151</sup> See Supreme Court, Decision No. 782/2516, Thai Language Version, (<http://www.deka.in.th/view-30486.html>).

<sup>152</sup> See Supreme Court, Decision No. 1309/2515, Thai Language Version, <<http://www.deka.in.th/view-28864.html>>.

<sup>153</sup> See Supreme Court, Decision No. 1709/2516, Thai Language Version, (<http://www.deka.in.th/view-30597.html>).

407/2501<sup>154</sup>, which decided that a company's committees could appoint agents as appropriate and be the plaintiffs or the defendants in civil or criminal cases. Two committees were authorized to sign and affix the company's seal under the control of general meeting. Since, the committees did not authorize the manager, the manager cannot prosecute in the name of the company.

It can say that, since a juristic person has similar rights and duties to that of an individual, it can prosecute. Nevertheless, the prosecution is considered as the declaration of an intention. Thus, the juristic person must appoint a representative according to Civil and Commercial Code, Section 75 to take the action. For example, the Supreme Court, Decision No. 944/2497<sup>155</sup> decided that an abbot could authorize a churchwarden to sue a person who invaded their temple's land according to the Sangha Act, B.E. 2505 (1962). The juristic person may authorize any person to litigate a criminal or civil case as well as complain in the name of the juristic person as stated in the Supreme Court, Decision No. 755/2502<sup>156</sup>, which decided that a juristic person could authorize a person to complain. If the juristic person's representative(s) who persecuted is dead, then the juristic person will be able to continue the prosecution since the juristic person is considered as a litigant (The Supreme Court, Decision No. 480/2502<sup>157</sup>. A temple authorized a churchwarden to prosecute. After the churchwarden dead, the lawyer of the temple could continue the prosecution.)<sup>158</sup>.

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<sup>154</sup> See Supreme Court, Decision No. 407/2501, Thai Language Version, (<http://www.deka.in.th/view-43577.html>).

<sup>155</sup> See Supreme Court, Decision No. 944/2497, Thai Language Version, (<http://www.deka.in.th/view-50597.html>).

<sup>156</sup> See Supreme Court, Decision No. 755/2502, Thai Language Version, (<http://www.deka.in.th/view-40097.html>).

<sup>157</sup> See Supreme Court, Decision No. 480/2502, Thai Language Version, (<http://www.deka.in.th/view-40025.html>).

Since, the juristic person can be a plaintiff in a criminal or civil case, the juristic person can have civil or criminal liabilities. The juristic person has the civil liabilities if its action(s) is under its objectives or governing laws. The juristic person has the criminal liabilities if its wrongful act(s) provides a reason(s) to punish the juristic person. Example of its wrongful acts includes wrongful acts with fine or forfeiture as punishment. The juristic person can be executed for its wrongful acts with execution as punishment because only an individual can be executed.

However, the aforementioned wrongful act(s) must be taken by its representative(s) under Section 75 of the Civil and Commercial Code be under the scope of its objectives and it must receive benefits from the wrongful act(s) as stated in the following the decisions of Supreme Court<sup>159</sup>;

The Supreme Court, Decision No. 787/2506<sup>160</sup>. If a juristic person declared its intention(s) through its authorized representative(s) according to its objectives, the intention(s) would oblige to the juristic person and considered as its own intention(s). Accordingly, the juristic person might have the intention(s) that was a component of its crime(s). The criminal punishment(s) would depend on the reason(s) for punishing the juristic person. That is, the juristic person's crime(s) and its representative(s)' behavior(s) and authority (authorities) must be consider according to its objectives (this case is about trademark parody).

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<sup>158</sup> S. Na-rangsi, "Administration of the Thai Sangha: Past, Present and Future," The Chulalongkorn Journal of Buddhist Studies, 1(2) (2002): 59-74.

<sup>159</sup> *Ibid.*

<sup>160</sup> See Supreme Court, Decision No. 787/2506, Thai Language Version, (<http://www.deka.in.th/view-43067.html>).

The Supreme Court, Decision No. 1669/2506<sup>161</sup>. Even though, a juristic person could not take all actions that an individual could do, it could have the intention(s) to commit a criminal crime(s) if its action(s) was under its objectives and it received the benefit(s) from the action(s) (this case is about forgery for transporting minerals to other countries).

The Supreme Court, Decision No. 584/2508<sup>162</sup>. Both juristic person and its representative who was a committee might be criminally punished, if the representative's wrongful act(s) complied with the juristic person's registered objectives and provided benefit(s) for the juristic person.

*Notes\** to sue a juristic person as a defendant, only the juristic person's name is needed. That is, its representative(s)' name(s) is not necessary. For example, Supreme Court, Decision No. 1525/2495<sup>163</sup> decided that only a juristic person's name was enough for suing the juristic person because the juristic person normally had a representative(s). This principle can also be applied to the case that a juristic person is a plaintiff. Put simply, only the juristic person's name was required. However, the names of juristic persons' representatives are practically identified.

In summary, under Section 75 of the Civil and Commercial Code, a juristic person's representative is an authorized person, under governing laws or the juristic person's regulations, which can manage or take any action that can oblige with the juristic person. For instance, a minister is a ministry's representative. A director-general is a department's representative. A provincial governor is a province's

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<sup>161</sup> See Footnote No.56

<sup>162</sup> See Supreme Court, Decision No. 584/2508, Thai Language Version, ([http:// www. deka.in.th/view-42305.html](http://www.deka.in.th/view-42305.html)).

<sup>163</sup> See Supreme Court, Decision No. 1525/2495, Thai Language Version, (<http://www.deka.in.th/view-48613.html>).

representative. A mayor is a municipality's representative. An abbot is a temple's representative. A manager or committee is a registered partnership's or limited company's representative. An authorized manager is an associations' representative. A manager is a foundation's representative. However, it should be noted that a juristic person's representative under Section 75 is significantly different from an agent under Section 797. These two terms cannot be substituted.

### 2.2.3 Statutes of Juristic Person

In the past, a juristic person was considered as an artificial being. Later, it is considered as a fictitious person. It is believed that the concept of the fictitious person originated during the age of Pope Innocent IV<sup>164</sup>. Nonetheless, every lawyer in every era accepts that a juristic person is an organization consisting of individuals. It is a legally established organization. The common objective of most juristic person is to respond to people's right to claim. The juristic person is a collection of the individuals' debts. Some lawyers defined that the juristic person refers to a group of individuals legally authorized to take actions in the form of a group. Since, a number of individuals gather in order to conduct a business or take an action, the right to claim and the debt from the action or business is more complicated than an individual. The individuals have different backgrounds and personalities. Hence, their objectives are gain benefit and decision making power. This activity leads to many important issues (e.g. How to make a contract for this gathering? How to deal with their properties? How to share or manage profits and losses?). To solve these issues, laws that clearly state practices and criteria relevant to the issues are needed. As a result, there are laws about groups, partnerships and companies have been enacted in order to respond to business needs<sup>165</sup>.

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<sup>164</sup> D. Brodowski, Espinoza, M., and Tiedemann, K. , "Regulation Corporate Criminal Liability: An Introduction," Switzerland: Springer International Publishing. (2014).

<sup>165</sup> M. Koessler, "The Person in Imagination or Persona Ficta of the Corporation," Louisiana Law Review, 9(4) (1949): 435-449.

Similarly, Sheley (2013) mentioned that laws usually allow juristic persons to have rights and duties similar to individuals. For example, a juristic person can be a creditor or debtor. It can be sued or sue<sup>166</sup>. Nevertheless, it is accepted that some rights and duties must only be preserved for individuals because the rights and duties are directly related to the individuals. Since, the individuals are the ones that gain benefits from the establishment of a juristic person, the juristic person is considered as a fictitious person cannot take any action itself. It must take the action through other persons or representatives who are individuals<sup>167</sup>.

For the juristic person which has registered documents for the establishment as the setting documents, otherwise, it may specify its different objectives such as the registration of the limited company must have the company's memorandum specifying its objectives attached to the application for registration. It may specify the objectives that "being the broker, agent or trading agency of all types of businesses and doing the businesses of rice, corn and cassava, ...", etc. which normally the applicant must specify dozens of items of objectives in order to let the company have the rights to operate its business, widely, but it must be under the provisions of other related laws, in particular, the business that must be allowed to operate before such as the commercial bank, life insurance or disaster insurance. If it is not allowed, though it will specify in the setting document, it has no rights to operate such business. Also, if it is the business that it is not specified in the document of the registration for the establishment of the juristic person. The juristic person shall not be entitled to carry out any objectives other than its registration<sup>168</sup>.

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<sup>166</sup> Sheley, E., "Perceptual Harm and the Corporate Criminal," University of Cincinnati Law Review.

<sup>167</sup> L. Diplock, "Corporations Don't Kill People- People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill " New York Law School Law Review., 46 (2003): 851-865.

<sup>168</sup> Phansumit, J. 'Attacking the Proceeds of Crime in Thailand' (2012) Resource Material Series No. 83:75-92.

Besides, in terms of punishment measure against the juristic person in Thailand can explain that, when considering the Penal Code, Section 18<sup>169</sup>, the degree of a punishment against the juristic person like capital, imprisonment and confinement is impossible. Added by the will of the legislative excluding the Penal Code, Section 3<sup>170</sup> out of them implies that the legislative does not require the application of the Penal Code against the juristic person. The sample brought from the Supreme Court, Decision No. 3446/2537, in aforementioned is evident that the 20,000 Baht fine is not but valueless when compared to the catastrophe and sentimental evidence of the public

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<sup>169</sup> Thailand Penal Code, B.E. 2499 (1956), Section 18 Punishments for inflicting upon the offenders are as follows:

1. Death;
2. Imprisonment;
3. Confinement;
4. Fine;
5. Forfeiture of property

The capital punishment and life imprisonment shall be not enforced to offender less than eighteen years of age.

In case of offender less than eighteen years of age has committed the offence to be punished with death or imprisoned for life, the punishment, as aforesaid shall be deemed as commuted as imprisoned for fifty years.

<sup>170</sup> Thailand Penal Code, B.E. 2499 (1956) Section 3 If the law in force at the time of committing the offence is different from that in force after the time of committing the offence, the law which is, in any way, more favorable to the offender, shall be applied, unless the case is final. But, in the case where it is final as follows:

1. If the offender has not yet undergone the punishment, or is undergoing the punishment, and the punishment determined by the judgment is heavier than that provided by the law afterwards, when it appears to the court from the file of the case, or when the offender, the legal representative or guardian of such person, or the Public Prosecutor makes a request, the Court shall re-determine the punishment according to the law as provided afterwards. In re-determining the punishment by the Court, if it appears that the offender has undergone a part of the punishment, the Court, when having regard to the punishment as provided by the law afterwards, may, if it thinks fit, determine less punishment than the minimum punishment as provided by the law afterwards, if any, or if it is of opinion that the punishment already undergone by the offender is sufficient, the Court may release the offender;
2. If the Court has passed the judgment of death upon the offender, but, according to the law as provided afterwards, the punishment to be inflicted upon the offender is not as high as death, the execution of the offender shall be suspended, and it shall be deemed that the punishment of death according to the judgment has been changed to be the highest punishment to be inflicted according to the law as provided afterwards.

concerns. The improper judgment against the criminal offence is not a responsive case against those offenders under the contemporary criminal law.

The imprisonment stands alone as the main punishment against the criminal offender as the whole. When the penalty is applied against the juristic person, it tends to be nullification of the penalty measure. The fine measure is also not applicable against it since the juristic person may not possess any property or funds when Section 29 and Section 30 of the Penal Code<sup>171</sup>, the imprisonment is greatly inconceivable. All are not good samples of adjudication of the Supreme Court without creditability and reliability. However, it is necessary to find better criminal punishment in the pipeline by means of the more appropriate degrees of the punishment measure in supports by the capability and assets of the business nature operated by the juristic person<sup>172</sup>. It can say that, the juristic person which is creatively established by the application of law is operated by funds for a certain purpose in business. The profit is aimed by a legalized group whose assets are put in the business purpose. The sharing profits are distributed directly to the

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<sup>171</sup> Thailand Penal Code, B.E. 2499 (1956)

Section 29 If any person inflicted with the punishment of fine fails to pay the fine within thirty days as from the day on which the Court has passed judgment, the property of such person shall be seized to pay for the fine, or else such person shall be confined in lieu of fine. But, if the Court has reasonable cause to suspect that such person is likely to evade the payment of the fine, the Court may order such person to find security, or may order such person to be confined in lieu of fine in the near time.

The provisions in the second paragraph of Section 24 shall not apply to the confinement in lieu of fine.

Section 30 In case of the detention on behalf of fine, it shall be taken hold of rate of two hundred Baht per one day, and irrespective of whether one offence or several offences, it is prohibited the detention in excess of oneyear period unless in case of the Court gives a judgment on fine as from eight ten thousand Baht upwards, the Court will issue an order to detain on behalf of fine as the period of time in excess of one year but not out of two years.

In calculation of period of the time the date beginning detention on behalf of fine shall be calculated together, and the full day shall be calculated without into consideration of hour amount.

In case of the fined person to be detained before the Court's trial, the day amount when one person to be detained shall be deducted from the fined money amount which is deemed the rate of two hundred Baht per one day, unless such person is adjudged and inflicted both imprisonment and fine. In such ease, if the day amount, when one person to be detained, must be deducted from the time, when one person imprisoned, under Section 22, it shall be deducted before, the rest amount is deducted from fine.

When the fined person has been detained on behalf of fine to be due, that person shall be released on the date following the date terminated, if the fine has been paid plenary, one shall be released without delay.

<sup>172</sup> Sheley, E., "Perceptual Harm and the Corporate Criminal," University of Cincinnati Law Review.

shareholders by law. When the criminal offence against the juristic person is put the penalty<sup>173</sup>. It should be a more specific measure based on the nature of the formed juristic person describing that the fine and forfeiture of property should be the main criminal measures against the established juristic person by law. The penalty is a mechanism for the motive of the operation legally carrying out by the ownership or the shareholders of the corporation<sup>174</sup>.

The debates remain amount the fine measure is evaluated by law. The broader samples of the environmental effect are determined when it is found that the original water source is contaminated as many as that the monopoly rights and the antitrust are charged. The acute damage and loss of the society and economy may not be cured in a proper way if the amount of fine measure is not high to cover the damaged value. So, the juristic person may find it bad for its operation in business. The chain effect is responding to the reduction of the annual bonus or salary of the firm executives, for instance. But, the 20,000 Baht fine from the Supreme Court, Decision No. 3446/2537 against the Siam Gas Industry Co., Ltd. will not be good sample for any juristic person to be determined as bad in order to intimidate the corporation since the fine amount may not be compare to the amount of the registration fee paid by the company at once.

It is conclusive that the amount of fine resulting from the criminal offence requires good adjustment and calculation from an application of the relative laws; the Securities and Exchange Act, B.E. 2535 (1992), Section 268<sup>175</sup> provides that the fine penalty shall be not exceeding two fold of the sale exchange value but no less than

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<sup>173</sup> A. Weissmann, and Newman, D. , "Rethinking Criminal Corporate Liability," Indiana Law Journal, , 82 (2007): 411-451.

<sup>174</sup> P. Pettit, "Responsibility Incorporated," Ethics, 117 (2007): 171-201.

<sup>175</sup> Securities and Exchange Act, B.E. 2535 (1992), Section 268 Any person who contravenes Section 32, Section 33 or Section 34 shall be liable to imprisonment for a term not exceeding two years or a fine not exceeding two times the price at which all securities were offered for sale by such person but not less than five hundred thousand baht, or both.

500,000 Baht or Section 269<sup>176</sup> on the fine of not exceeding 500,000 Baht and 10,000 Baht per day when the breach of agreement is found. The fine formality may not be applied to the non-serial criminal offence. In other word, the fine measure calculated under the Act may not be proper when compared to the profits gained by business operation. The higher fine formality shall be applied by the Competition Act, B.E. 2542 (1999), Section 51<sup>177</sup> provides the settle fine penalty at “not exceeding one million Baht” and “the persistence of the offender probed shall be up to multiplication including Section 52 providing the fine penalty from two up to six million baht added by not exceeding 50,000 Baht per day during the breach of agreement”<sup>178</sup>. The fine penalty under the law may be too much in practice but when determined by the monopolized firm, the fine penalty may be meaningless against that juristic person whose profits is beyond. In practice, the size of the juristic person is important for the fine formality as the whole<sup>179</sup>. Besides, the size of the corporation is the calculated sum of the fine penalty which may force the operation of the firm. The size of the company will directly influence the amount of fine or level of penalty that will be taken to the company. However, the wrongful act done by the company must relate to the criminal liability of the corporation<sup>180</sup>. Otherwise, the penalty will definitely not affect on the property and

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<sup>176</sup> Securities and Exchange Act, B.E. 2535 (1992), Section 269 Any person who contravenes or fails to comply with the conditions issued in accordance with Section 35 shall be liable to a fine not exceeding five hundred thousand baht and a further fine not exceeding ten thousand baht for every day during which the contravention continues.

<sup>177</sup> Competition Act, B.E. 2542 (1999), Section 51 Any person who violates Section 25, Section 26, Section 27, Section 28 or Section 29 or fails to comply with Section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.

<sup>178</sup> Competition Act, B.E. 2542 (1999), Section 52 Any person who fails to comply with the order of the Commission under section 30 or section 31 or with the decision of the Appellate Committee under section 47 shall be liable to imprisonment for a term of one to three years or to a fine of two to six million Baht, and to a daily fine not exceeding fifty thousand Baht throughout the occurrence of such violation.

<sup>179</sup> Weissmann, A., and Newman, D. ‘Rethinking Criminal Corporate liability’ (2007) Indiana Law Journal, 82.

psychology against the juristic person. The large corporation may be put the criminal offence against the exclusive staff of the executives in the high ranks. Therefore, the penalty can make positive effects<sup>181</sup>.

The concept of the Alter Ego is usually applied by Thailand's legal system. The sample laws which is in application of it provide that "in the case that the juristic person is put criminal offence by relative law, the corporate representative is as of the same offence are all fundamental in the Thai legal system." In consequence, the juristic person is considered as the actor of the criminal offence (the penalty is not included), who bounds it back against the corporate representative as well. The application of the concept appears in the Social Security Act, B.E. 2533 (1990), Section 101<sup>182</sup> and Thailand Labor Protection Act, B.E. 2541 (1998), Section 158<sup>183</sup>; Factory Act, B.E. 2535 (1992), Section 63<sup>184</sup>; The Competition Act, B.E. 2542 (1999), Section 54<sup>185</sup>; *Prices of*

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<sup>180</sup> D.J. Ohlin, "Group Think: The Law of Conspiracy and Collective Reason," Journal of Criminal Law and Criminology, 98(1) (2007): 147-206.

<sup>181</sup> W. Rutledge, "Legal Personality—Legislative or Judicial Prerogative," Washington University Law Review, 14(4) (1929): 343-374.

<sup>182</sup> Social Security Act, B.E. 2533 (1990), Section 101 In the case where the juristic person is an offender and being penalized under this Act, the representatives of such juristic person, all directors and other persons who are responsible for the implementation of such juristic person shall be liable to the same penalty as imposed to the juristic person, provided that such person can prove that he or she is not connive at the commission of such offense or has provided a reasonable measure to prevent the commission of such offense.

<sup>183</sup> Labor Protection Act, B.E. 2541 (1998), Section 158 Whereas the offender is a juristic person, if a violation by such juristic person is due to an order or performance of any person, or a neglects order or, a neglect of a duty as required as a Managing Director or of any person who is responsible for carrying out the business of such a juristic person, the such person shall be penalized according to the provisions prescribed for such violations.

<sup>184</sup> See Footnote No. 24

<sup>185</sup> Competition Act, B.E. 2542 (1999), Section 54 In the case where the person who commits an offence punishable under this Act is a juristic person, then, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or he or she has already taken reasonable action for preventing the commission of such offence from occurring.

Goods and *Services Act*, B.E 2542 (1999), Section 42<sup>186</sup>, the Securities and Exchange Act, B.E. 2535 (1992), Section 301<sup>187</sup>, for example. Under the Securities and Exchange Act, B.E. 2535 (1992), Section 301, the criminal offence against the corporate representative is considered as of the juristic person when the offender testifies, if the authorization is assigned by the managing director while the other relative laws are allowed the corporate representative to appear oneself in the court for adducing evidences in order to plead on guilty.

The practice above is a concept of the vicarious liability in application but the model is not proper in practice. When it is applied by the Penal Code, Section 2<sup>188</sup> and based on the Section 32<sup>189</sup>, the provision under the relative laws above may require amendment via the legal process. It can say that, an application of law under the

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<sup>186</sup> Prices of Goods and Services Act, B.E. 2542 (1999), Section 42 In the case where an offender liable to a penalty under this Act is a juristic person, the managing director, managing partner or person responsible for the operations of the juristic person on such matter shall also be liable to the penalties provided for such offense unless it can be proven that such act was committed without such person's knowledge or consent or he or she has reasonably undertaken acts to prevent the commission of the offence.

<sup>187</sup> Securities and Exchange Act, B.E. 2535 (1992), Section 301 In cases where a person who commits an offence under Section 278, Section 288 or Section 289 is a juristic person, the director, manager or any person responsible for the operation of such juristic person shall also be liable to the penalties as provided for such offences, unless it can be proven that such person has no involvement with the commission of offence by such juristic person.

<sup>188</sup> Thailand Penal Code, B.E. 2499 (1956) Section 2 A person shall be criminally punished only when the act done by such person is provided to be an offence and the punishment is defined by the law in force at the time of the doing of such act, and the punishment to be inflicted upon the offender shall be that provided by the law.

If, according to the law as provided afterwards, such act is no more an offence, the person doing such act shall be relieved from being an offender; and, if there is a final judgment inflicting the punishment, such person shall be deemed as not having ever been convicted by the judgment for committing such offence.

If, however, such person is still undergoing the punishment, the punishment shall forthwith terminate.

<sup>189</sup> Thailand Penal Code, B.E. 2499 (1956) Section 32 Any property is prescribed by the law that any person makes or processes to be an offence, such property shall be forfeited wholly, irrespective of whether it belongs to the offender and there is the person inflicted with the punishment according to judgment or not.

provisions which state that if the relative law provides a more specific criminal offence against the action or no action of the juristic person who may be put the criminal penalty, it is unavoidable to have it provided that the duty on performance or no performance is as of the ordinary persons prior to the charge against the juristic person. This is obviously a support on a status and relationship between the juristic person and the corporate representative. Regarding the penalty measure against the juristic person in particular, it is suggested that the certain punishment against it is more rational in practice, rather than against the corporate representative who is considered as of the criminal offence of the "performance" by the juristic person. The idea is applied in the Securities and Exchange Act, B.E. 2535 (1992), Section 238<sup>190</sup> which provides that any stock exchange company is found guilty under the relevant article when it is proven that the Stock Exchange Company is operated, not operated by the authorization assigned by the committee, the manager or any person who is responsible for the performance of the corporation, that person shall be put punishment<sup>191</sup>.

The modified provision from the former law was the corporate representative is obliged to testify in the court for ignorance of the performance by the juristic person into the provision on the proof of oneself for the scope of authorized duty and performance under the general criminal law<sup>192</sup>. But, the idea of the criminal offence against the corporate representative. However, the representative should be taken a wrongful act which related to the corporate criminal liability as well. This action is related to the principle of the vicarious liability. The criminal penalty against the

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<sup>190</sup> Securities and Exchange Act, B.E. 2535 (1992) Section 238 No securities company or any person responsible for the operation of a securities company or company which issues securities or any person having an interest in the securities shall impart any false statement or any other statement with the intention to mislead any person concerning the facts relating to the financial condition, the business operation or the trading prices of securities of a company or juristic person whose securities are listed in the Securities Exchange or are traded in an over-the-counter center.

<sup>191</sup> M. Petrin, "Reconceptualizing the Theory of the Firm from Nature to Function," Penn State Law Review, 118 (2013): 1-52.

<sup>192</sup> Weissmann, A., and Newman, D. , "Rethinking Criminal Corporate Liability," Indiana Law Journal.

offender, the penalty taken by the law must be taken into the person who offense under the law, includes the amendment issue should provide the only actor who performs against criminal offence is put the criminal penalty<sup>193</sup>.

In similar way, Kraakman (n.d.) explains the objective of the company is playing an important role in public interests. The objective of business operation should provide benefits and do not conflict to the law. Consider the court case, most of the court decision will relate to the role of the company and the corporation, that is the role of the company or the corporation must not be contrary to the law. At the same time, the decision provided by the court is important information that will help consumers with knowledge about the wrongful act of the company or the juristic person, including the criminal punishment that will be taken to the corporation if they act conflict by the law.<sup>194</sup>

Apart from the fine and forfeiture of the property in some countries, the measure of liquidation of the juristic person that be the person who have the authority to order the employees or has the power to indicate the objective of the company. However, those authorities should be taken under the law or the court decision. They were court order of the suspending or revoking the license temporarily or permanently, which appears in the new issue of the Penal Code 1992 of France<sup>195</sup>. The measures are in application of many acts; the Mineral Act, B.E. 2510 (1967), Section 140 providing that the mineral lease holder who violates the law shall be put a fine penalty in an amount of not exceeding ten thousand Baht and the minister is authorized to revoke the license. The penalty is legally a criminal punishment but the revoking of the license is not a criminal punishment and even safety control<sup>196</sup>. The minister has a full power to revoke

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<sup>193</sup> Weissmann, A. 'A New Approach to Corporate Criminal Liability' (2007) *American Criminal Law Review*, 44.

<sup>194</sup> Kraakman, H.R. 'Vicarious and Corporate Civil liability' *Individual Research* No. 3400:669-681.

<sup>195</sup> Pop, I.A. (2006).

the license hence the court is not authorized to give a criminal punishment but only ruled that the juristic person is found guilty under Section 140. Thus, the additional measure includes the order of cessation or revoking of the license apart from the fine and forfeiture of property<sup>197</sup>.

Besides, the application of the criminal penalty can be found in the Competition Act, B.E. 2542 (1999), Section 34 providing that when the court's judgment is found the criminal penalty against the offender under Section 25, 26, 27, 28 or 29, "the court has an order for the business owner to suspending, ceasing or fixing." The provision may be useful to guide in the amendment of other relative laws which are applied in the similar ways<sup>198</sup>. It is noted that the "suspension, cessation or fixing" which all are not under the criminal punishment by law". Regarding the business owner ignores the order given by the Competition Commission Board for suspension, cessation or fixing (under Section 31<sup>199</sup>) and Section 52<sup>200</sup> is applied against the offender by law.

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<sup>196</sup> Mineral Act, B.E. 2510 (1967), Section 140 The holder of a Prathanabat who violates Section 76 shall be liable to a fine not exceeding ten thousand baht and the Minister is empowered to revoke the Prathanabat.

<sup>197</sup> Weissmann, A. 'A New Approach to Corporate Criminal Liability' (2007) American Criminal Law Review, 44.

<sup>198</sup> Competition Act, B.E. 2542 (1999), Section 34 In the case where the Court passes a judgment that any business operator is guilty of an offence under Section 25, Section 26, Section 27, Section 28 or Section 29, the Court shall issue an order requiring the business operator to suspend, cease, rectify or vary such act.

<sup>199</sup> Competition Act, B.E. 2542 (1999), Section 31 In the case where the Commission considers that a business operator violates Section 25, Section 26, Section 27, Section 28 or Section 29, the Commission shall have the power to issue a written order requiring the business operator to suspend, cease, rectify or vary such act. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.

The business operator who receives the order under paragraph one and disagrees therewith shall have the right to appeal under section 46.

The business operator may not claim compensation from the Commission by reason that the Commission has issued the order under paragraph one.

<sup>200</sup> See Footnote No. 169

#### 2.2.4 Criminal Liability for Employment in Thailand

Considering the important Supreme Court Decisions which relate to the Employer Verification can be explained as; Supreme Court, Decision No. 852/2543<sup>201</sup>. All plaintiffs were the defendant's employee. After, the defendant transferred the ownership of its company to the lessee under Section 577 of the Civil and Commercial Code<sup>202</sup>, the lessee did not pay for rentals and all plaintiffs accepted the lessee as their new employers. Therefore, the lessee became the employer of all plaintiffs according to the Ministry of Interior's announcement (Section 2<sup>203</sup>) about labor protection.

The Employer Repudiation can explain by focusing on this court decision; Supreme Court, Decision No. 3999/2528<sup>204</sup>. The insurance agency agreement was made between the company, the principal, and its agent under the Civil and Commercial Code. The agent had the right to be paid for commissions, but it could not receive other benefits such as bonus and allowance that regular employees received. The agent had to clock-in/out and get the permissions from the company or its supervisor before taking leaves<sup>205</sup>. It was found that the agent did not violate the mentioned regulation and or

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<sup>201</sup> See Supreme Court, Decision No. 852/2543, Thai Language Version, (<http://www.deka.in.th/view-27595.html>).

<sup>202</sup> Thailand Civil and Commercial Code, Section 577 The employer may transfer his right to a third person with the consent of the employee.

The employee may have a third person render the services in his place with the consent of the employer.

If either party acts contrary to this provision, the other party may terminate the contract.

<sup>203</sup> Thailand Civil and Commercial Code, Section 2 It shall come into force on first of January B.E. 2468.

<sup>204</sup> See Supreme Court, Decision No. 3999/2528, Thai Language Version, (<http://www.deka.in.th/view-27345.html>).

<sup>205</sup> Sudti-autasilp, B. (2008).

setting instrument was not regulations and not considered as an employee of the company.

However, the Descriptions of Employer can be explained by focusing on the following statement<sup>206</sup>. It can say that, a person authorized by an individual – an employer who is an individual may be busy and cannot monitor his or her employee(s). Thus, the employer authorizes a person(s) to do so. For example, Mr. Chot, an employer, has to go abroad. Hence, he assigns Mr. Chit to monitor his business.

Consider a person authorized by a juristic person, this means a person who is a legal representative, under Section 70 of the Civil and Commercial Code<sup>207</sup>, such as committee, manager and director.

Important Supreme Court Decisions related to this point is;

Supreme Court, Decision No. 3129/2549<sup>208</sup> shown the first defendant was a juristic person. The second defendant was an authorized signatory. Accordingly, the first defendant was the plaintiff 's employer under Section 5 of the Labor Protection Act, B.E. 2541(1998)<sup>209</sup>. As an employee, the second defendant had liabilities under Section

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<sup>206</sup> W. Kaleck, and Maab, S.M. , "Corporate Accountability for Human Rights Violations Amounting to International Crimes," Journal of International Criminal Justice, 8 (2010): 669-724.

<sup>207</sup> Thailand Civil and Commercial Code, Section 70 A juristic person must have one or several representatives, if it is not otherwise provided by the law, or defined in regulations or constitutive act, decisions as to the affairs of juristic person are made by a majority of representatives.

<sup>208</sup> See Supreme Court, Decision No. 3129/2549, Thai Language Version, <<http://www.trclabourunion.com/d950.html>>.

<sup>209</sup> Labor Protection Act, B.E. 2541 (1998), Section 5 In this Act:

“Employer” means a person who agrees to accept the employee to work and pays wage in return thereof, including:

- (1) a person who is entrusted to do work for the employer;
- (2) a representative of a juristic person and a person entrusted by a representative of a juristic person if the employer is a juristic person;
- (3) in the case where the entrepreneur pay lump sum wage to any person having duty to control the working of, and pay wage to, the employee or duty to procure the employee to do work for the employer whereby such procurement of employee is not a part of the employment business, and such

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work is a part or the whole of production process or business under responsibility of the entrepreneur, such entrepreneur is deemed to be the employer of such employee;

“Employee” means a person who agrees to work for the employer in return of wage, irrespective of the name of such relationship;

“Hirer” means a person who agrees to hire another person to carry out any work, wholly or partly, for his or her own benefit and agrees to pay consideration for the completion of such work;

“First contractor” means a person who agrees to complete any work, wholly or partly, of the hirer;

“Sub-contractor” means a person who enters into a contract with the first contractor with a view to carry out any responsible work of the first contractor, wholly or partly, for the benefit of the hirer, including a person who enters into a contract with the sub-contractor to carry out any responsible work of the subcontractor, irrespective of the numbers of the sub-contraction;

“Employment contract” means a contract made in writing or orally which its context is clearly expressed, or may be implied, that a person called the employee agrees to work for a person called the employer and the employer agrees to pay wage in return of work throughout the working period;

“Working day” means a day determined as the ordinary working day of the employee;

“Holiday” means a day determined as the weekly holiday, traditional holiday or annual holiday of the employee;

“Leave” means a day which the employee leaves from working due to sickness, sterilization, necessary business, military service, training or knowledge and skill development or parturition;

“Wage” means money agreed upon by the employer and employee to be paid in return of work under the employment contract upon such ordinary working period basis as hourly, daily, weekly, monthly or other period, or upon the result of work done by the employee during the ordinary working period of a working day, including money paid by the employer to the employee on holiday and leave which the employee is not working, but entitling to such money under this Act;

“Working day wage” means the wage paid for the full time work on the ordinary working period;

“Minimum wage rate” means the wage rate determined by the Wages Committee under this Act;

“Basis rate” means the wage rate determined by the Wages Committee to be basis for determining of the minimum wage rate;

“Overtime work” means the work done after, or in excess of, the ordinary working period or the daily working hours on the working day or holiday, as the case may be, as agreed upon by the employer and employee under section 23;

“Overtime pay” means money paid by the employer to the employee in return of the overtime work done on a working day;

“Holiday pay” means money paid by the employer to the employee in return of work done on a holiday;

“Holiday overtime pay” means money paid by the employer to the employee in return of the overtime work done on a holiday;

“Severance pay” means money paid by the employer to the employee upon termination of employment other than money agreed to be paid by the employer;

“Special severance pay” means money paid by the employer to the employee upon the expiration of the employment contract due to special circumstances prescribed by this Act;

“Cumulative money” means money remitted by the employee to the Employees Welfare Fund;

“Counterpart fund” means money paid by the employer to the employee so as to remit to the Employees Welfare Fund;

“Labor inspector” means a person appointed by the Minister for the execution of this Act;

“Director-General” means the Director-General of the Department of Labor Welfare and Protection;

“Minister” means the Minister having charge and control for the execution of this Act.

77 and Section 820 of the Civil and Commercial Code. In other words, if the second defendant took an action(s) in the name of the first defendant and under the first defendant's objectives, then the second defendant would not have personal liabilities. However, the second defendant had the liabilities under Section 5 of the act and Section 77 and Section 820<sup>210</sup> of the Code.

A person authorized by a juristic person's representative, a juristic person's representative may be busy and authorize a person(s) to monitor his or her business that can be considered the following articles of the Civil and Commercial Code of Thailand.

Section 70 of the Civil and Commercial Code states that a juristic person must have one or more representatives. Its intention(s) can be declared through the representative(s)<sup>211</sup>.

Section 77 of the Civil and Commercial Code states that the provisions about agents of this code govern cases about the relationships between juristic persons and their representatives<sup>212</sup>.

Section 577 of the Civil and Commercial Code states that an employer can transfer his or her own rights to the third party (parties), if the employer and his or her employee(s) agree that the third party (parties) can do their job(s). If any party violates this provision, then another party may terminate the agreement<sup>213</sup>.

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<sup>210</sup> Thailand Civil and Commercial Code  
Section 77 *see* Footnote No.72

Section 820 The principal is bound to third persons by the acts which the agent or the subagent has done within the scope of his authority by virtue of his agency.

<sup>211</sup> *See* Footnote No. 198

<sup>212</sup> *See* Footnote No. 72

<sup>213</sup> *See* Footnote No. 193

Section 820 of the Civil and Commercial Code states that a principle is obliged with the third party (parties) for the business(es) conducted by its representative under the scope of the representative's authority<sup>214</sup>.

#### 2.2.4.1 Fair Restrictions of the Rights of Employers and Employees

Since employment is a reciprocal agreement. Put differently, employers want their employees to work for them by paying the employees, while the employees want to be paid by the employers for their jobs. Therefore, if the employers have to keep their trade secrets from the third parties, especially for their competitors, by restricting their employees' rights to work, then the restrictions should appropriately and fairly protect their rights and benefits. Additionally, the employers must provide opportunities for the employees to gain benefits from the jobs<sup>215</sup>. On the other hand, the employees should not betray the employers by violating the confidentiality rights of the employers in order to provide any benefit for the employers themselves or the employers' competitors<sup>216</sup>.

#### 2.2.4.2 The Issue regarding Confidentiality

If the employers want to keep their trade secrets from the parties, especially for his or her competitors, then the employers must identify and separate the secrets from general information. The employers also have to use appropriate measures in order to keep the secrets by, for example, marking the word "secret" or "confidential" on the documents containing the secrets, storing the documents in safes, or assigned a person(s) to be responsible for the secrets<sup>217</sup>. If, the employers do not clearly identify or

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<sup>214</sup> See Footnote No. 201

<sup>215</sup> Mattar M., 'Corporate Criminal Liability: Article 10 of the Convention against Transnational Organized Crime' (2012) *Journal of International Affairs*, 66(1).

<sup>216</sup> Spurgeon, W., Allen, F., and Terence, P. 'Criminal Liability for Life Endangering Corporate Conduct' (2010) *Journal of Criminal Law and Criminology*, 100(2).

<sup>217</sup> *Ibid.*

neglect the confidential information, then the information may not be legally confidential. Furthermore, their employees will not know the confidential information that they must not access<sup>218</sup>.

#### 2.2.4.3 Employment Contracts and the Scope of Restrictions

After, the employers use the confidentiality measures, the employers must consider about employment contracts if the employers want to work with their employees. The contracts may be made in the written or spoken form. Nonetheless, there is an agreement that the employees should state in the contracts (i.e. the employees must not conduct businesses or work for the employers' competitors or indirectly compete with the employers during the employment periods). Even though, the contracts are made in the spoken form, this agreement should not be overlooked<sup>219</sup>. A number of employers may not know that they do not only be able to prohibit their employees to compete with them or work for their competitors during the employment periods, but they can also prohibit their employees to do so after the employment periods according to their discretions, the employees' consents and/or the decision of the courts.

Moreover, the employers can restrict the types of businesses and business areas for the employees. For instance, the employees may be prohibited to compete with their employers only in Bangkok or perimeters. Nevertheless, this does not mean that the employers have no limits to set restrictions. They must consider whether or not their restrictions are appropriate. In other words, they must provide opportunities for their employees to work or conduct other types of businesses<sup>220</sup>.

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<sup>218</sup> C.N. Nana, "Corporate Criminal Liability in South Africa: The Need to Look Beyond Vicarious Liability.," *Journal of African Law*, 55(1) (2011): 86-104.

<sup>219</sup> W. Meeks, "Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?," *Columbia Journal of Law & Social Problems*, 40(1) (2006): 77-124.

<sup>220</sup> Beale, S.S. 'A Response to the Critics of Corporate Criminal Liability' (2009) *American Criminal Law Review*, 46.

#### 2.2.4.4 Confidentiality without Employment Contract and Unused Confidential Data

If the employers and their employees cannot make written employment contracts or make the contracts that do not state the prohibitions to compete with their businesses or use their trade secrets for the employers' own benefits, then it will not mean that the employers will have no opportunity to restrict the employees' rights about the issues<sup>221</sup>. This is because the employers can make other contracts (i.e. non-competition, non-disclosure and confidentiality contracts) with the employees. The purpose of these contracts is to restrict the employees' rights to work or prohibit the employees to compete with the employers<sup>222</sup>.

The previously mentioned cases are the cases that the employees compete with their employers or work for their employers' competitors by using the employer's trade secrets during or after their employment periods<sup>223</sup>. If an employee(s) uses his or her employer's trade secret(s), then it will be considered that the employee is guilty. However, if the employee(s) competes with the employer or works for the employer's competitor(s) without using the trade secret(s) and the employer agrees with the employee(s) that the employee(s) must not compete with the employer during or after the employment contract, then it will be considered that the employee(s) violate his or her contract(s)<sup>224</sup>.

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<sup>221</sup> Khanna, V.S. 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) Harvard Law Review, 109(7).

<sup>222</sup> S. Oded, "Inducing Corporate Compliance: A Compound Corporate Liability Regime," International Review of Law and Economics, 31(4) (2011): 272-283.

<sup>223</sup> M.B. Bixby, "Was It an Accident or Murder? New Thrusts in Corporate Criminal Liability for Workplace Deaths," Labor Law Journal, 41(7) (1990): 417-423.

<sup>224</sup> Y.Z. Stern, "Corporate Criminal Personal Liability--Who Is the Corporation?," Journal of Corporation Law, 13(1) (1987): 755-781.

#### 2.2.4.5 Restrictions of Employees' Rights: Fairness

As previously mentioned that the employers can restrict their employees to compete with them or work for their competitors during or after the employment periods or they can specify the areas or types of businesses that the employees must not involve. Nevertheless, the restrictions must be appropriate<sup>225</sup>.

To protect the employers' benefits, the restrictions of the employees' rights and liberties can be used as necessary. Additionally, the employers must consider the fairness. If the employers appropriately restrict their employees' rights and liberties or provide opportunities for the employees to work, then the restrictions will be fair or vice versa<sup>226</sup>. For example, company - a manufactures and distributes construction materials. The company makes a written confidentiality contract with Mr. B, an employee in its marketing department, in order to prohibit him to compete with it in any place in the world during and after his employment period.

According to the above case, although the employer provides opportunities for the employee to conduct other types of businesses, the employer unfairly specifies the prohibited areas and time period. Thus, this contract is quite unfair for the employee. A contract states that an employer prohibits an employee to work for his or her competitors or the competitors' shareholders in the Indo-China Peninsula during and after the employee's employment contract for five years. In this case, even though, the employee may feel that the employer set a long prohibition period, the period is clear and the employee can work for other types of companies and in other areas. That is, the employee's rights are fairly protected<sup>227</sup>.

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<sup>225</sup> I.B. Lee, "Corporate Criminal Responsibility as Team Member Responsibility.," Oxford Journal of Legal Studies., 31(4) (2011): 755-781.

<sup>226</sup> C. Hurt, "The Undercivilization of Corporate Law.," Journal of Corporation Law., 33(2) (2008): 361-445.

<sup>227</sup> Hurt, C. (2008).

Furthermore, it can be stated that, regardless of the sizes of businesses, employees are needed for employers' benefits. If the employees damage to the other persons or commit violations, the employers must also be responsible for the damages that are caused by the employers' orders<sup>228</sup>.

For the employers' liabilities, there is no definite scope of the employees' jobs since the employers may order the employees to take actions that are not the employee's duties. For instance, an employer orders his accountant to drive his company's pickup to transport products<sup>229</sup>. However, the accountant's pickup crashes with other vehicle. In this case, the employer cannot claim that he does not employ the accountant to do it because the accountant did it for the employer's benefits as he ordered. Any violations committed by employees and damaging the other persons must be considered whether or not the violations provide benefits for the employers. If the violations provided the benefits, then the employers cannot refuse to accept their liabilities. For example, an employer prohibits its employees to be out of their ways while doing their duties. The employer orders an employee to drive a truck in order to delivery soil to his customer. At noon, the employee goes out of his way in order to have lunch and then scrapes other vehicle. In this case, the employer must be responsible for the damage because the employee did it for the employer's benefits. In contrast, if the employee fights with the customer, then the employer will not have to be responsible for the employee because it is a private matter<sup>230</sup>.

At the same time, some employers make agreements with their employees in order to specify that the employers do not have to be responsible for the

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<sup>228</sup> Voiculescu, A., "Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability," Journal of Business Ethics.87

<sup>229</sup> *Ibid.*

<sup>230</sup> W.A. Nolan, Hadley, R.E. , "Employment Law and Wikileaks: The Challenge and Opportunity for Employment Liability Managers.," Employee Relations Law Journal., 37(1) (2011): 25.

damages caused by the employees' violations<sup>231</sup>. Nonetheless, these employers cannot refuse to be responsible for the damages because the violations unfairly affect to the third parties. Even though, the employers have to compensate for the damages, they can take recourses in order to request employees to compensate them because the injured parties must be recovered by the employers with better economic statuses than their employees<sup>232</sup>.

Recourse is an action to remedy an injured person. The employers only take recourses for compensations and interests for the third parties. However, the relationships between the employers and their employees must be considered because the employees can employ persons to do duties, while the employees cannot hire persons to do other duties that the persons are hired to. Thus, the hired persons are not employees<sup>233</sup>. If the persons damage the third parties, then the hirers do not have to be responsible for the damages. To prevent the damages, the employers have to consider persons' behaviors. To request their employees to compensate for their expenses for recourses, they have to consider whether or not the requests are worthy for the employee's competencies and contributions to their companies<sup>234</sup>.

#### 2.2.4.6 The Issue regarding the Punishment of Corporation in Thailand

Unfair decisions on juristic persons' liabilities have a number of effects. If this issue is not solved, then it will cause problems in the future. Generally, there are five criminal punishments as stated in Section 18 of the Criminal Code as follows: "...the

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<sup>231</sup>B.U. Ihugba, "The Governance of Corporate Social Responsibility Developing an Inclusive Regulation Framework.," International Journal of Law & Management ., 56(2) (2014): 105-120.

<sup>232</sup> M.E. Stucke, "In Search of Effective Ethics & Compliance Programs.," Journal of Corporation Law., 39(4) (2014): 769-832.

<sup>233</sup> Lee, I. B., "Corporate Criminal Responsibility as Team Member Responsibility.," Oxford Journal of Legal Studies..

<sup>234</sup> Oded, S., "Inducing Corporate Compliance: A Compound Corporate Liability Regime," International Review of Law and Economics..

punishments for culprits are as follows: (1) execution, (2) imprisonment, (3) detention, (4) fine and (5) confiscation."<sup>235</sup>

Accordingly, only some criminal punishments are applicable for the juristic persons: the fine and confiscation. On the other hand, the execution, imprisonment and detention are not applicable for the juristic persons because the juristic persons are legal entities with legal rights and duties<sup>236</sup>. Additionally, the juristic persons can take actions through their representatives. Therefore, the juristic persons may take wrongful acts through the representatives. These acts also include the ones that are attributed to environmental problems<sup>237</sup>.

An important issue about the petition was the second – fourth defendants must also have liabilities as that of the first defendant, the juristic person. They should compensate the plaintiffs for their disabilities to work according to the damaged that the plaintiffs received. Furthermore, the plaintiffs should have the right to claim for the hospital fees paid by public organizations because the supports were the public welfares for the plaintiffs, not the supports from the public organizations as their representatives. Consequently, the third party sold the emitter's component, a lead bar containing cobalt-60, to the junk shop and then the bar was cut into pieces. The high radiation occurred because of this activity. It was dangerous for people who worked and lived in the junk shop and surrounding inhabitants. In this case, Miss Jitraporn Jian-Udomsap, Miss Sasikan Songsripipat, Mrs. Thawin Saejia, Mr. Satian Pankhan (i.e. Mr. Nipon Pankhan's father), Mrs. Nong Pankhan (i.e. Nipon's mother), Miss Surenoi Yoocheroen, Miss Janthip Petchrat, Miss Somjai Kaewpradap, Mr. Jitsaen Jansaka, Mr. Sonthaya

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<sup>235</sup> See Footnote No. 159

<sup>236</sup> Lee, I. B., "Corporate Criminal Responsibility as Team Member Responsibility.," Oxford Journal of Legal Studies.

<sup>237</sup> Hurt, C., "The Undercivilization of Corporate Law.," Journal of Corporation Law.

Saprathum, Mr. Boonthueng Sila and Miss Pattana Thamniyom were the first – twelfth plaintiffs, respectively, who sue Kamol Sukosol Electric Company Limited, Kamol Sukosol Company Limited, Mrs. Kamala Sukosol (i.e. managing director), Miss Liab Tianprasit (i.e. managing director) and Mr. Chaweng Suwannarat (i.e. medical equipment manager), who were the first – fifth defendants, respectively .

Hence, an additional measure should be used in order to compensate the society by providing a public service. However, the civil damages should not be compensated since the damages that the litigants have to separate from this issue<sup>238</sup>.

Consider types of the criminal offence against the juristic person in Thailand can explained that, basically, the rules and the applications of law for their own legitimacy shall not be overlooked. The researcher who studied on the adjudication of Thailand's Legal System may confuse what they appear to become results of the individual court case. Firstly, it is evident that the application of the criminal offence is not always in corresponding to the Criminal Law which is requisite. Secondly, the legal system of Thailand involves with the Civil Law which states the resolution of the system should be dealt with the based Civil Law System<sup>239</sup>.

Moreover, the analysis of the Criminal and Civil Law System may not be applied more efficiently. Under the application of the criminal law, they are more specifically criminal offence against the juristic person namely the Partnership, Company, Association, and Foundation, B.E. 2499 (1956)<sup>240</sup>; the *Public Limited*

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<sup>238</sup> Based on the Appeal Court, Decision No. 11713-11714/2551, Thai Language Version, ([http://enlawfoundation.org/newweb/wp-content/uploads/cobalt60\\_decision\\_appealcourt1.pdf](http://enlawfoundation.org/newweb/wp-content/uploads/cobalt60_decision_appealcourt1.pdf)).

<sup>239</sup> D. Danielsen, and Kennedy, D. , "Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act," *School of Law Faculty Publications*, (2011): 5-75.

<sup>240</sup> Act Determining Offences Relating To The Register Partnership, Limited Partnership, Limited Company, Association, and Foundation, B.E. 2499 (1956) English Language Version, ([http://www.dbd.go.th/dbdweb\\_en/more\\_news.php?cid=287&filename=index](http://www.dbd.go.th/dbdweb_en/more_news.php?cid=287&filename=index)).

*Companies Act*, B.E. 2535 (1992), Section 191 (The company which is not compliance by law shall be in a fine penalty of twenty thousand Baht) under Section 200-201,

Section 205-206 and Section 208<sup>241</sup>, Securities and Exchange Act, B.E. 2535 (1992) under Section 283<sup>242</sup>. Others are more specific and more directed to the performance of the agent like the Labor Protection Act, B.E. 2541 (1998), Section 10 against the employer who infringes or disobeys by law shall be sentenced to fine and imprisonment

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<sup>241</sup> Public Limited Companies Act, B.E. 2535 (1992)

Section 191 Any company which fails to comply with section 11, section 25, section 31 paragraph two, section 40, section 48, section 51, section 55 paragraph one, section 58, section 59, section 62 paragraph two, section 63 paragraph two, section 64, section 65 paragraph three, section 108 paragraph two, section 127, section 133, section 138 paragraph two, section 142, section 143, section 145 paragraph two, section 188 or section 189 shall be liable to a fine not exceeding twenty thousand Baht.

Section 200 Any company which fails to comply with section 61, section 62 paragraph one or section 96 paragraph one shall be liable to a fine not exceeding fifty thousand Baht.

Section 201 Any company which violates section 66 shall be liable to a fine not exceeding fifty thousand Baht or two times the value of shares held or pledged, whichever is higher.

Section 205 Any company which fails to comply with section 109 shall be liable to a fine not exceeding two hundred thousand Baht and an additional daily fine of two thousand Baht, until the failure is corrected.

Section 206 Any company which fails to comply with section 110, section 111 or section 137 shall be liable to a fine not exceeding twenty thousand Baht.

Section 208 Any company which fails to make rectification pursuant to the order of the Registrar given under section 132(3) shall be liable to a fine not exceeding fifty thousand Baht.

<sup>242</sup> Securities and Exchange Act, B.E. 2535 (1992), amendment by the Securities and Exchange Act (No.4) B.E. 2551, Section 283 In cases where any securities company commits an offence under Section 92, Section 96, Section 102, Section 105, Section 106, Section 108, Section 109, Section 110, Section 113, Section 114, Section 115, Section 116, Section 117, Section 123, Section 129, Section 130, Section 135, the first paragraph, second paragraph or third paragraph of Section 140, Section 151 or the first paragraph of Section 195 or violates or fails to comply with the rules, conditions or procedures or orders issued in accordance with Section 92, Section 117, Section 135 or Section 150, the director, manager or any person responsible for the operation of such securities company shall be liable to imprisonment for a term not exceeding six months or a fine not exceeding two hundred thousand baht, or both, unless it can be proven that such person has no involvement with the commission of offence by such securities company.

In cases where any securities company commits an offence under Section 97, Section 98, Section 112, Section 122, Section 124, Section 125, Section 126, the first paragraph of Section 134, Section 136, or Section 139 (1), (2), (3) or (4) or violates or fails to comply with the rules, conditions or procedures or orders issued in accordance with the fourth paragraph of Section 90, Section 91, Section 98(7) or (10), Section 139 (4), Section 141, Section 142, Section 143 or Section 144, the director, manager or any person responsible for the operation of such securities company shall be liable to imprisonment for a term not exceeding one year or a fine not exceeding three hundred thousand baht, or both, unless it can be proven that such person has no involvement with the commission of offence by such securities company.

or both<sup>243</sup>, the Mineral Act, B.E. 2510 (1967), Section 132 bis (ownership or processor of vehicle)<sup>244</sup>, Section 140 (the mineral lease holder)<sup>245</sup>, Section 141 (the mineral lease

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<sup>243</sup> Labor Protection Act, B.E. 2541 (1998), Section 10 Under Section 51 paragraph two, an Employer shall be prohibited from demanding or receiving from an Employee a security deposit for work or a security deposit for damage to work regardless of money, other property or surety ship by person, unless the nature or conditions of work require the Employee be responsible for money or property belonging to the Employer, which may cause damage to the Employer. The nature or conditions of work which the Employer is allowed to demand or receive a security deposit from the Employee, as well as any type of the security, values of the security and means of keeping shall be in accordance with the rules and procedures as prescribed in the Notification by the Minister.

Where the Employer demands or receives the security deposit or makes a guarantee contract with the employee to compensate for damage done by the Employee, when an employment is terminated by the Employer or the resignation is made by the Employee or the guarantee contract is expired, the Employer shall pay back the security thereof plus interests, if any, to the Employee within seven days from the date of termination of employment, or from the date of resignation, or from the expiry date of the guarantee contract, as the case may be.

<sup>244</sup> The Mineral Act, B.E. 2510 (1967), Section 132 bis Whoever fails to comply with the order of the Director under Section 9 octo shall be punished as follows:

(1) Violation of Section 9 octo (1) (a) shall be subject to a punishment of imprisonment for the term of one to three years or a fine of fifty thousand to three hundred thousand Baht, or both.

(2) Violation of Section 9 octo (1) (b) (c) (d) or (g) or Section 9 octo (2) (a) or Section 9 octo (3) (e) shall be subject to a punishment of imprisonment for the term not exceeding two years or a fine of ten thousand to a hundred thousand Baht, or both, and, in the case where the aforesaid violation continues, by a daily fine of two thousand Baht throughout the period of violation.

In case of violation under Section 9 octo (1) (g), if the offender has proved that the violation was necessary and unavoidable for a reason, which was not his fault or was caused by his participation, for the safety of life or property, he shall be exempt from the punishment.

(3) Violation of Section 9 octo (1) (e) or Section 9 octo (2) (b) or Section 9 octo (3) (b) shall be subject to a punishment of imprisonment for the term not exceeding one year or a fine of two thousand to thirty thousand Baht, or both.

(4) Violation of Section 9 octo (1) (e) or Section 9 octo (2) (b) or Section 9 octo (3) (a) (c) or (d) shall be subject to a punishment of imprisonment for the term not exceeding one year or a fine of two thousand to thirty thousand Baht, or both and, in the case where the aforesaid violation continues, of a daily fine of five hundred Baht throughout the period of violation. *(As amended by Section 15 of the Minerals Act No.5 B.E. 2545)*

If the holder of an Exclusive Prospecting Atchayabat, Special Atchayabat, Provisional Prathanabat, Prathanabat, Licensee, or the holder of a permit under this Act committed the offence according to this Section, the Minister shall have the power to revoke the Exclusive Prospecting Atchayabat, Special Atchayabat, Provisional Prathanabat, Prathanabat, License, or permission, as the case may be. *(Added by Section 8 of the Emergency Decree amending the Minerals Act, B.E. 2528)*

<sup>245</sup> See Footnote No. 187

holder or the mineral sub-leased holder)<sup>246</sup> and Section 147 bis<sup>247</sup> (The licensee of the storage of minerals, of the mineral processing, of the metallurgical processing)<sup>248</sup>, of the metallurgical processing) for example.

However, the fundamental system of law in Thailand is not relevant to those delegated legislation, the civil law in more particular. It is discussed that the irrelevance of the criminal law may cause to an inapplicable element for the criminal offence against the juristic person. In addition, the criminal offence taken under no intention reason will consider differently to others whether a certain degree of punishment against the criminal intent, the intent of criminal offence under the Penal Code, Section 59-62<sup>249</sup> and the more specific intent of criminal offence result the

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<sup>246</sup> The Mineral Act, B.E. 2510 (1967), Section 141 The holder of a Prathanabat or sub-lessee of mining operations who fails to comply with the conditions prescribed under Section 77 shall be liable to a fine not exceeding two thousand baht.

<sup>247</sup> The Mineral Act, B.E. 2510 (1967), Section 147 bis Any Mineral Storage Licencee, a Mineral Processing Licencee, or a Metallurgical Processing Licencee whose mineral store, mineral processing area, or the metallurgical processing area, as the case may be, is established as a mineral depository, who violates or fails to comply with the conditions as prescribed in the first paragraph of Section 103 ter shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand baht, or both.

*(Added by Section 9 of the Emergency Decree amending the Minerals Act, B.E. 2526)*

<sup>248</sup> J. Chella, "The Complicity of Multinational Corporations in International Crimes: An Examination of Principles" (PhD Degree Bond University, 2012).

<sup>249</sup> Thailand Penal Code

Section 59 A person shall be criminally liable only when such person commits an act intentionally, except in case of the law provides that such person must be liable when such person commits an act by negligence, or except in case of the law clearly provides that such person must be liable even though such person commits an act unintentionally.

To commit an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing.

If the doer does not know the facts constituting the elements of the offence, it cannot be deemed that the doer desired or could have foreseen the effect of such doing.

To commit an act by negligence is to commit an offence unintentionally but without exercising such care as might be expected from a person under such condition and circumstances, and the doer could exercise such care but did not do so sufficiently.

An act shall also include any consequence brought about by the omission to do an act which must be done in order to prevent such consequence.

criminal charge against the juristic person and even the juristic person can be charged against its negligence.

The study of legislation which is more suitable with Thailand's Legal System may create practical concepts of the criminal offence against the juristic person more or less<sup>250</sup>. In consequence, it is suggested that the category of law consisting of internal and external component of actions are considered as the followings;

(1) The Criminal Law providing the more specific criminal offence against the juristic person; the level specific criminal offence is applied directly to the criminal penalty against the juristic person. Fortunately, the interpretation by law is not problematic<sup>251</sup>, for example, the Partnership, Company, Association, and Foundation, B.E. 2499 (1956)<sup>252</sup>, the *Public Limited Companies Act*, B.E. 2535 (1992)<sup>253</sup>, Securities

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Section 60 Whenever any person intends to commit an act against a person, but the effect of the doing of such act occurs to another person through a slip, it shall be deemed that such person intentionally commits such act against the person who suffers from the bad effect of such doing. But, in case of the law provides for the infliction of heavier punishment on account of individual status or the relation between the doer and the person suffering from the bad effect, such law shall not be applied so as to inflict the heavier punishment on the doer.

Section 61 Whenever any person intends to commit an act against a person, but commits such act against another person by mistake, such person may not raise the mistake as an excuse that such person did not intentionally commit such act.

Section 62 Whenever any fact, if really existing, will cause the doing of any act not to be an offence, or the doer not to be punishable, or to receive less punishment, and even though such fact does not really exist, but the doer understands mistakenly that it really exists, the doer shall not be guilty, or shall be exempted from the punishment, or shall receive less punishment, as the case may be.

If ignorance of fact according to the third paragraph of Section 59, or the mistake as to the existence of fact according to the first paragraph has occurred through the negligence of the offender, the doer shall be liable for committing the offence by negligence in case of the law specifically provides that the doer shall be criminally liable for the act though committed by negligence.

A person shall receive heavier punishment on account of any fact only when such person must have known of such fact.

<sup>250</sup> F.T. Maassarani, "Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act," *International Law and Politics*, 38(39) (2006): 39-65.

<sup>251</sup> *Ibid.*

<sup>252</sup> See Footnote No. 231

<sup>253</sup> See Public Limited Companies Act, B.E. 2535 (1992) English Language Version, ([http://www2.austlii.edu.au/~graham/AsianLII/Thai Translation/Public Limited Company Act.pdf](http://www2.austlii.edu.au/~graham/AsianLII/Thai%20Translation/Public%20Limited%20Company%20Act.pdf)).

and Exchange Act, B.E. 2535 (1992)<sup>254</sup> while the will of fundamental law is required to be widely discussed in order that the criminal penalty is served by the rule of law and at will of the legislative. Under the concept of diverse legality from many theories of law, the group of the corporate persons always is affected by any actions or partial performance of crimes. The breach of any provision of related laws may cause some troubles of financial management of the corporation from a fine measure and possibly result in liability dividend<sup>255</sup>.

The complexity of economy and the established corporation in a form of the juristic person has been remarkably changed from the traditional practice. The criminal penalty against the juristic person may be in large amount which the individual person or a corporate group is affordable when the related crime is also hard to identify against the criminal actor<sup>256</sup>. The latter is much simple to be considered as the criminal offence against the juristic person as a clear target. More Public Laws have been increasingly designated to protect the benefits of the public and likely to be compromised with the requirement of legalized application from both advantages and disadvantages<sup>257</sup>.

(2) The Criminal Law providing the legal competency or status of the offender the law is different from (1) due to no provision of the direct action performed by the juristic person and of the criminal penalty against the juristic person. The alternated person who is legally competent to tasks is considered as the criminal offender, for example the “mineral lease holder” under the Mineral Act, B.E. 2510

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<sup>254</sup> See Securities and Exchange Act, B.E. 2535 (1992) English Language Version (<http://www.sec.or.th/EN/SECInfo/LawsRegulation/Documents/actandroyal/1Securities.pdf>).

<sup>255</sup> Chella, J., "The Complicity of Multinational Corporations in International Crimes: An Examination of Principles."

<sup>256</sup> Maassarani, F. T., "Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act," International Law and Politics.

<sup>257</sup> *Ibid.*

(1967), Section 140<sup>258</sup> on the mineral lease holder who infringes the regulation under Section 76<sup>259</sup> is put a fine charge of not exceeding ten-thousand-baht meantime the minister is authorized to withdraw the mineral lease from the licensee. Most jurists reviewed that the legal competency or status of the offender as the individual person or the juristic person, whoever has been assigned by law as that shall be given the criminal penalty related to the criminal ground. The Supreme Court, Decisions No. 3615/2528<sup>260</sup> under Minerals Act, B.E. 2510 (1967), the penalty is put against the partnership Co., Ltd. and the owner who was charged on the adulterated oil under 25 tri assigned status as the “oil trader”.

The Supreme Court Decisions No. 1508/2515<sup>261</sup> reviewed that the juristic person is put criminal penalty caused by the employee as the examiner of commodity standard who was guilty by a mistake of giving a wrong certification of commodity standard against the commodity standard for Export Promotion Act, B.E. 2503 (1960)<sup>262</sup>; Supreme Court, Decision No. 674/2520<sup>263</sup> reviewed that the limited company is penalized as in a status of “the licensee of the transportation business” under

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<sup>258</sup> See Footnote No. 187

<sup>259</sup> The Mineral Act, B.E. 2510 (1967), Section 76 The holder of a Prathanabat shall not sublease to another person the mining operation within any part or the whole of the mining area unless a licence is obtained from the Minister or the person entrusted by him.

The rules, procedures and conditions for the issuance of a Mining Sublease Licence and the cancellation thereof shall be prescribed by a Ministerial Regulation. *(As amended by Section 15 of the Minerals Act No.3, B.E. 2522).*

<sup>260</sup> See Supreme Court, Decision No. 3615/2528, Thai Language Version, (<http://www.deka.in.th/view-103503.html>).

<sup>261</sup> See Supreme Court, Decision No. 1508/2515, Thai Language Version, (<http://www.deka.in.th/view-28890.html>).

<sup>262</sup> See Export Promotion Act, B.E. 2503 (1960), English Language Version, ([http://thailaws.com/law/t\\_laws/tlaw0090.pdf](http://thailaws.com/law/t_laws/tlaw0090.pdf)).

<sup>263</sup> See Supreme Court, Decisions No. 674/2520, Thai Language Version, (<http://www.deka.in.th/view-37526.html>).

the Land Transportation Act as many as the Supreme Court, Decision No. 380/2532<sup>264</sup> reviewed that the juristic person operating mining when the mineral lease was expired was guilty as “the licensee of the storage of mineral” under the Minerals Act, B.E. 2510 (1967). The punishment is put against the juristic person who is considered as a legal status or competency with no intention, if it is an individual person or even the juristic person.

The consideration of the law applied may be doubtful if the will of the legislative was aimed for a legal competency and status of the juristic person. Opposed to the idea of the criminal law applied in aforementioned, The Supreme Court, Decision No. 3615/2528 reviewed that the second defendant, the manager who was not in a legal status of the “fuel trader” was also put the criminal penalty. The court applied only the component of the performance<sup>265</sup>.

In some court cases, the Supreme Court adjudicated by applying the inter-discipline of the Civil and Criminal Law making the criminal offence of the defendant by the concept of vicarious liability which the grounded charge was the offence of the infringement under the Civil law, not the Criminal Offence. Again, the Supreme, Court Decision No.1508/2515<sup>266</sup> reviewed that the defendant “the company” was guilty causing by the performance of its employee. The point to be considered is that the juristic person is covered by the Civil and Commercial Code which allows the juristic person to become or deprive of right and duty under the Civil and Commercial Code as the ordinary person while the Criminal Law does not provide the right and duty for the juristic person who shall never be grounded in criminal offence as the ordinary person.

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<sup>264</sup> See Supreme Court, Decision No. 380/2532, Thai Language Version, (<http://www.deka.in.th/view-21091.html>).

<sup>265</sup> See Footnote No. 251

<sup>266</sup> See Footnote No. 252

Some jurists criticize the difference between the offence of the infringement under the Civil and Criminal Law explaining that the Civil Law targets in an application of compensation for a loss or damage while the Criminal Law makes use of its concept for criminal offence by charging with the punishment. The purpose of the Civil Law provides an offence of the infringement and charge with measure of compensation while the Criminal Law aim to control the criminal mind of the offender who may be found guilty and receive the criminal penalty. If it is proven the Criminal Offence caused by the uncommon manner with or without criminal intent as an internal component of crime, the punishment measure is useless. The criminal concept focuses on the criminal intent in committing crimes which harm people in the society<sup>267</sup>. In details, the Civil and Commercial Law, Section 15<sup>268</sup> provides the personality the right and duty that without the personality, the right and duty may not exist while the Criminal Law, the personality is never put criminal offence by the punishment. Nevertheless, the right and duty of the criminal offender are entitled by the particular law and only the offender who shall be penalized<sup>269</sup>. The author may argue that the criminal penalty is not all related to the concept of the typical laws when the unsettled controversy remains.

(3) The Criminal Law providing no particular offence applied to put against the juristic person, no legal status and competency of the criminal offender. It can say that, the scope of the criminal offence that the Criminal Law does not provide the level of the offense done by the juristic person in order to consider as the criminal offence. The level specific law in some particular crimes does provide the criminal

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<sup>267</sup> Danielsen, D., and Kennedy, D. , "Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act," School of Law Faculty Publications.

<sup>268</sup> Thailand Civil and Commercial Code, Section 15 Personality begins with the full completion of birth as a living child and ends with death.

A child *en ventre sa mere* is capable of rights provided that it is thereafter born alive.

<sup>269</sup> Lee, I. B., "Corporate Criminal Responsibility as Team Member Responsibility.," Oxford Journal of Legal Studies.

punishment; the Partnership Co., Ltd. Act Determining Offences Relating to Partnerships, Companies, Associations and Foundations, B.E. 2499 (1956)<sup>270</sup>. The development of the specific law may protect the judge from carry out the case related to criminal offence. The criminal penalty which the judge may apply other concept of no intent or vicarious liability under other irrelevant law to put punishment against the intent of the juristic person may be out-scope of the Criminal Law in practice<sup>271</sup>.

When considering the Penal Code, the Criminal Law provides the term “whoever”, the term can be either the ordinary person or the juristic person. Thai Court’s adjudication reviewed that the juristic person may have been charged as the criminal offence; the same law which is applied in the level specific law because the judge may use the term “whoever” as the juristic person who may involve with the counterfeit trademark as “The counterfeit document, public cheating and fraud and fault of cheque” for example. These statements are not related to the particular crimes against the juristic person and the intent of criminal offence<sup>272</sup>.

The Court of Thailand adjudication always involves with the performer or the performance, the external component of the criminal offence which the juristic person may be charged against it. Even though, the law does not provide a legal competency and status of the actor in particular. The judge usually considers the performance of the authorized corporate representative who is in-scope of performance related to a status of the juristic person. Although, the criminal offence requires “criminal intent”, of which the judge considers it as the intent of the juristic person and even the “more specific intent”<sup>273</sup>.

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<sup>270</sup> See Footnote No. 231

<sup>271</sup> G. Milovanovic, Barac, N., and Andjelkovic, A., "Corporate Social Responsibility in the Globalization Era," *Facta Universitatis*, 6(2) (2009): 89-104.

<sup>272</sup> *Ibid.*

<sup>273</sup> P. Hauck, and Peterke, S. , "Organized Crime and Gang Violence in National and International Law," *International Review of the Red Cross*, 92(878) (2010): 407-436.

The sample of the “criminal offence of intent” performed by the corporate representative as the performance of the juristic person can be observed in the Supreme Court, Decision No. 787/2506<sup>274</sup> reviewing that “the intent of the juristic person” is always considered as the performance of the corporate representative under the Civil and Commercial Code, Section 75 when any intention of the juristic person is under the authorization of the corporate representative, it is engaged by law which is related to the intent of the juristic person.

Hence, the intent of the juristic person is always considered as the criminal offence and the penalty which requires as the criminal intent of the juristic person whose objectives are additional evidences for consideration of any intent of criminal offence per each of the objective. “it is proven that Mr. Boonpen, the defendant performed his assignment on selling drugs which is considered per objective of the Partnership Co., Ltd. Thus, it is considered as the intent and performance of the Partnership Co., Ltd. under the grounded criminal offence against Mr. Boonpen, the defendant.”

The aforementioned has influenced on the adjudication by the Supreme Court of Thailand’s Judiciary System. The other cases have followed that Supreme Court, Decision No. 787/2506. However, the judgment is not only the punishment under the concept of Alter Ego but also against the corporate representative which are sampled in the Supreme Court, Decision No. 63/2517<sup>275</sup>, the Supreme Court, Decision No. 1965/2531<sup>276</sup>, for example.

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<sup>274</sup> See Footnote No. 151

<sup>275</sup> See Supreme Court, Decision No. 63/2517, Thai Language Version, (<http://www.deka.in.th/view-29165.html>).

<sup>276</sup> See Supreme Court, Decision No. 1965/2531, Thai Language Version, (<http://www.deka.in.th/view-19832.html>).

In addition, the judge adjudicated that the corporate manager's performance is considered as the juristic person's performance when they both are accessory to the actions of fault cheque as the criminal intent. The other sample of the Supreme Court Decision No. 4707/2534<sup>277</sup> reviewed that the second defendant and the third defendant as the first defendant "partnership manager" issued cheque with corporate stamp on it which was not belong to the second defendant and the third defendant. The evidence appeared that the second defendant and the third defendant appeared to co-act with the first defendant in the check dispute. Hence, the second defendant and the third defendant are engaged with criminal offence against the first defendant by law. The confusion of the adjudication resulting in the possession of cheque issued and the circumstances from the beginning to the end of the trial has been controversial issue by its adjudication of the same Court document. It is presumable that if the judgment is based on the Civil Law, the cheque is solely a possession of the juristic person as observed by a payee cheque and its stamp logo.

While under the Criminal Law the possession of the cheque is a possession of all members in the corporation. The Common Law-based countries are applied this concept without doubts. The author comments on the application of the related law which requires a renewal of the relevant law which separate from the Traditional Civil Law applied by the judge for ages. It is noted that the requirement of the amendment of the law is prerequisite. Otherwise, the confused adjudication may cause to more controversial in the judiciary system as the whole.

Besides, the Supreme Court, Decisions No. 556/2530<sup>278</sup> reviewed that the defendant was dairy product manufacturer whose product was proven to become

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<sup>277</sup> See Supreme Court, Decision No. 4707/2534, Thai Language Version, (<http://www.deka.in.th/view-18486.html>).

<sup>278</sup> See Supreme Court, Decision No. 556/2530, Thai Language Version, (<http://www.deka.in.th/view-25404.html>).

excessive microorganism in it. The criminal offence was under the Food Act, B.E. 2522 (1979), Section 25 (3)<sup>279</sup> against both the first defendant “company” and the second defendant “The manager”. In the judgment was briefed as; the first defendant “the company” is the juristic person who is fictitious person acting under the relative law but no intent of crime by itself. The performance requires the corporate agent, the second defendant “The authorized person, to act on behalf of the first defendant “Company”. The charge against the performance of the first defendant is evidently against the performance of the second defendant by law.” As per the Supreme Court, Decision No. 556/2530, it is obvious that it is controversial to the Supreme Court, Decision No. 787/2506 which reviewed that even the intent is engaged between them, it is difficult to control during the production process.

Practically, the products are processed by the quality control and may cause to hazard in the public and this is the direct act against the criminal offence performed by the company not the corporate agent. It is impossible that there is no law which is considered as the action or no action of the juristic person is a criminal offence of the corporate representative or vice versa. It is conclusive that most of laws which are applied to the criminal offence against the juristic person provide the criminal penalty against the firm committee or the corporate committee who acts or acts nothing under the name of the juristic person.

The sample includes the Labor Protection Act, B.E. 2541 (1998), Section 158<sup>280</sup> provides that the criminal offence of the offender as the juristic person whenever

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<sup>279</sup> The Food Act, B.E. 2522 (1979), Section 25 No one may produce, import for sale or distribute the following foods:

(3) substandard food;

<sup>280</sup> Labor Protection Act, B.E. 2541 (1998), Section 158 Whereas the offender is a juristic person, if a violation by such juristic person is due to an order or performance of any person, or a neglects order or, a neglect of a duty as required as a Managing Director or of any person who is responsible for carrying out the business of such a juristic person, the such person shall be penalised according to the provisions prescribed for such violations.

the criminal offence charged involves with authorization or performance of any corporate persons in the company, whose duty depends on the operation of the corporation, that corporate person shall be punished by the criminal ground charged. Even though, there are several relative laws which provide as such but only different phrases used in them<sup>281</sup>.

It is not rational when the Supreme Court's adjudication reviewed that the juristic person is deserved to be as a criminal offender under the general criminal law even the criminal offence and the more particular intent of crime are considered as the criminal intent of the corporate representative as if it is the criminal intent of the juristic person. The application of the Civil and Commercial Code, Section 75<sup>282</sup> appeared in the Supreme Court, Decision No.787/2506 (or Section 70, book 1; amendment<sup>283</sup>) was not proper since the provision of the law is designed for the civil intent in more specific<sup>284</sup>.

In general, there are several particular laws which provide the penalty against the juristic person. But, some of the law indication is not describing the role of the objective of the law provision. More importantly, the criminal intent is under the concept of Mens Rea or evil intent which is impossible for the juristic person to act deliberately by the degree of the criminal intent by laws. It is arguable that the juristic person got drunk or absent mind or mental conditions better than the other juristic person. Regarding the corporate representative who may be younger or older and affected of the disease. The degree of criminal penalty shall be applied against it. It is noted that the adjudication of the Supreme Court may not be like but the legislator

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<sup>281</sup> Milovanovic, G., Barac, N., and Andjelkovic, A., "Corporate Social Responsibility in the Globalization Era," Facta Universitatis, .

<sup>282</sup> See Footnote No. 131

<sup>283</sup> See Footnote No. 151

<sup>284</sup> See Footnote No. 155

rather than the legal interpreter. Thailand's Legal System should not allow the Judiciary System to practice on the improper way. In the Common Law-based countries, the Court tends to find out concept of the legitimacy from Factual Court case while the Civil Code is allowed to an application of law by the court for the trial process in the guise of narrative method<sup>285</sup>.

## 2.3 Corporate Criminal Liability under Thai law

### 2.3.1 Corporate Criminal Liability and Juristic Person

According Civil Laws, persons can be categorized into natural and juristic person.<sup>286</sup> For juristic persons (corporate bodies), it can be summarily stated that a juristic person is a group of persons that conduct a particular business by using techniques in order to succeed in the business that a single person cannot do; for example, a business that requires many funds. Therefore, laws allow the group of persons to be considered as a person who has its own rights and duties. The group can be formed in order to conduct an activity that may be a social, economic, or political activity because the group or the juristic person does not have a physical body, life, and mind and it is not naturally born as a natural person. Thus, the juristic person can only exist under legal provisions.<sup>287</sup>

As laws accept the group of person as the juristic person, the juristic person has different status from the shareholder, director, or other officer of the juristic person. As

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<sup>285</sup> D.S. Brooks, and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," *Defense Counsel Journal*, 79(1) (2012): 12-20.

<sup>286</sup> Thailand Civil and Commercial Code, B.E. 2551.

<sup>287</sup> According to Thailand Civil and Commercial Code

Section 65 A juristic person can come into existence only by virtue of this Code or of other law.

Section 66 A juristic person has rights and duties conformity with the provisions of this Code or of other law within the scope of its power and duties, or its object as provided by or defined in the law, regulation or constitutive act.

Section 77 Subject to Section 66, a juristic person enjoys the same rights and is subject to the same duties as a natural person, by reason of their nature, may only be enjoyed or incurred only by a natural person.

a result, the rights and duties of the juristic person are governed by laws, regulations, or document required for the establishment of the juristic person. Generally, the juristic person has rights and duties similar to the natural person. For instance, the juristic person can have rights to own an asset, make a contract, prosecute, and be prosecuted; except for specific rights and duties that supposed to be of the natural persona according to Civil and Commercial Code, Section 66<sup>288</sup>. The existence of the juristic person does not depend on the increase, decrease, or death of members of the juristic person<sup>289</sup>.

Commonly, Dubber (2013)<sup>290</sup> explains a juristic person refers to a person who is assumed by laws to have a similar status as a natural person. Hence, the juristic person has similar abilities as the natural person; for instance, abilities to make a contract, be a creditor or debtor; rights to own assets such as land and money; and duties to pay taxes.

A juristic person can exist under relevant law according to the role of juristic person that indicated by the law. Laws must be considered in order to recognize possible juristic persons. Laws can assume that any entity can be a juristic person. There are two main types as mentioned;<sup>291</sup> Firstly, the juristic person under private laws are the juristic persons who are stated in the Civil and Commercial Code<sup>292</sup>. There are five sub-types of these juristic persons: (a) limited company, (b) limited partnership, (c) registered

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<sup>288</sup> Thailand Civil and Commercial Code, Section 66 A juristic person has rights and duties conformity with the provisions of this Code or of other law within the scope of its power and duties, or its object as provided by or defined in the law, regulation or constitutive act.

<sup>289</sup> L. Hung, "Securities Markets - a Place to Get Rich Quick or a Quicksand Going Straight to Jail - the Mens Rea Required for Insider Trading Criminal Liability," National Taiwan University Law Review, 5(2) (2010): 1-26.

<sup>290</sup> M.D. Dubber, "Comparative History and Theory of Corporate Criminal Liability," New Criminal Law Review, 16(2) (2013): 203-240.

<sup>291</sup> R.A. Robson, "Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability," American Business Law Journal, 47(1) (2010): 109-144.

<sup>292</sup> See Thailand Civil and Commercial Code, Chapter 2: juristic person, Part I. General Provisions.

ordinary partnership, (d) association, and (e) foundation. Secondly, the juristic persons under public laws are various juristic persons such as temple, province, ministry, bureau, department, and public organization that are stated in public laws<sup>293</sup>.

#### 2.3.1.1 Limitations of a Juristic Person

Normally, a juristic person has similar rights and duties to a natural person. Nonetheless, some rights and duties are specific for natural person. Moreover, the juristic person cannot make a decision by itself as compared to a natural person. The juristic person can only have rights and duties under its objective. It can only use its rights and do its duties through its legal representative(s)<sup>294</sup>

#### 2.3.1.2 Objectives of a Juristic Person

The juristic person's scope of authority, that is, these are the reasons and abilities of the juristic person. A legal representative is a person who expressed the intentions of the juristic person on behalf of the juristic person under a legal representative contract.<sup>295</sup>

#### 2.3.1.3 Statuses of a Juristic Person

An entity becomes a juristic person when:

It is registered as a juristic person under public laws and/or an act that establish the juristic person is enforceable. If it is a juristic person registered under public laws, then its domicile will be the location of its head office.<sup>296</sup>

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<sup>293</sup> *Ibid.*

<sup>294</sup> Thailand Civil and Commercial Code

Section 70 A juristic person must have one or several representatives as prescribed by the law, regulations or its constitutive act, decisions as to the affairs of juristic persons are made by a majority of the representatives.

Section 76 para 1 A juristic person is bound to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of their functions, saving its right of recourse against the causers of the damage.

<sup>295</sup> *Ibid.*

Moreover, in terms of the way to consider the criminal offence that against the corporate firm remains unsettled. Numbers of jurists generally review the characteristics of the juristic person as it has no criminal intent. The concept of the juristic person's status is nothing but creative or artificial being<sup>297</sup>. Although, the juristic person is treated as human being, but it is irrelevant to its capability of doing all things. Being considered on the Civil and Commercial Code, Section 67<sup>298</sup> on disclamation and duty of the juristic person describing that its status holds only limited entitlements and rights which is possessed by the ordinary person. This idea is applied to the criminal offence against the juristic person; its creative status, which is incapable of committing deliberately crime whereas the criminal offence requires malice in law (*Mens rea*) or guilty mind but the juristic person possesses none.

Thailand's Judiciary System seems unsuitable when consider the Supreme Court, Decision No. 787/2506 in that the juristic person committed deliberately crime against Section 274 is determined as guilty reasoning the criminal intent of the juristic person itself. It is executed by law. Hence, the performance of the juristic person appeared in criminal intent. The Con-jurists reviewed on the practice under the Civil and Commercial code, Section 70 on the intention (*animus et factum*) and deliberation of the juristic person is always considered via the ordinary person as corporate representative. It can say that, the legal indicated for application of a person related to asset but not related to the performance and the criminal offence of the juristic person. In extensive provision on the Civil and Commercial Act, Section 76 on the loss

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<sup>296</sup> According to Public Limited Companies Act, B.E. 2535 (1992) Section 16 "Fifteen or more natural persons may form a company by preparing a memorandum of association of the company and otherwise complying with this Act" and Section 41 "A company registered under this Act shall be a juristic person as from the date of acceptance of registration by the Registrar."

<sup>297</sup> N. Cavanagh, "Corporate Criminal Liability: An Assessment of the Models of Fault.," Journal of Criminal Law, , 75(5) (2011).

<sup>298</sup> See Footnote No. 104

caused by performance of corporate representative or any authorized persons<sup>299</sup>. It is effective by law the juristic person shall be responsible to pay for amount of value consideration; the element of the Civil and Commercial Code, which is not related to a criminal offence<sup>300</sup>.

The creative juristic person aims to fund reservation apart from personal property. The purpose of setting up the company is generally related to the business investment, and the juristic person is a person who represents the company. However, the objectives of the company need not always be contrary to law. The criminal intent under the Penal Code, Section 59<sup>301</sup> provides performance of criminal intent by the person as actor whose execution aims for his/ her achievement. It is indicated that the criminal offence under the Penal Code and the purpose as well as deliberation under the Civil and Commercial Code define differently in concept. Only, the ordinary person who is conscious can exclusively perform things in order to achieve the task<sup>302</sup>.

Presumably, the criminal intent may not be applied to the juristic person since the criminal law is designed for social importance describing that any actions apparently exist and in term of the personality when the individual person exists in identification. The Civil Law is designed for more specific purposes and requires any of creative beings to perform by objectives<sup>303</sup>. Considering the scope of authorization of the juristic person in Thailand can be explained that, the objectives of the company must be written into the company's rule or policy that indicated the authority of the

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<sup>299</sup> Evaluated from the Supreme Court, Decisions No. 787/2506.

<sup>300</sup> Brooks, D. S., and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," Defense Counsel Journal.

<sup>301</sup> See Footnote No. 239

<sup>302</sup> Spurgeon, W., Allen, F., and Terence, P. , "Criminal Liability for Life Endangering Corporate Conduct " Journal of Criminal Law and Criminology.

<sup>303</sup> N. Farrell, "Attributing Criminal Liability to Corporate Actors," Journal of International Criminal Justice, 8(3) (2010): 873-894.

juristic person. According to the Supreme Court, Decision No. 1050/2504<sup>304</sup>, the court ruled that the juristic person should not conflict by the law. However, the criminal offence may limit the activities or performances of business when the juristic person performs illegally. On the other hand, if the juristic person act conflicted by the law, the result may affect the corporate representative who is authorized more or less<sup>305</sup>.

Interestingly, it is suggested that the violation of the criminal law requires evidences of either in-scope or out -scope of the objectives of the corporation. In the Supreme Court, Decision No. 637/2509<sup>306</sup> when compared to No.1050/2504<sup>307</sup> was in common but only is found guilty, even the performance is in-scope of the objectives. Again, in the Supreme Court, Decision No. 637/2509, the court ruled not only mention to the juristic person, but also the second defendant “the president” and the first defendant “the company” were found guilty under the criminal offence.

In terms of the component of the criminal action per consideration on based ground in Thailand can explain that, The Penal Code, Section 59 para 1<sup>308</sup> provides that the criminal offence against any person requires intent, except only when the law provides the criminal offence in particular even no intent of action considered. The sample is the Customs Act, B.E. 2469 (1926), Section 16<sup>309</sup> provides that the

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<sup>304</sup> See Supreme Court, Decision No. 1050/2504, Thai Language Version, (<http://www.deka.in.th/view-47565.html>).

<sup>305</sup> E. A. Plimpton, and Walsh, D. , "Corporate Criminal Liability," American Criminal Law Review., 47(2) (2010): 331-362.

<sup>306</sup> See Supreme Court, Decision No. 637/2509, Thai Language Version, (<http://www.deka.in.th/view-41533.html>).

<sup>307</sup> See Supreme Court, Decision No. 1050/2504, Thai Language Version, (<http://www.deka.in.th/view-47565.html>).

<sup>308</sup> See Footnote No. 240

<sup>309</sup> The Customs Act, B.E. 2469 (1926), Section 16 A customs official may remove, land, and keep in a place of security any goods which have not been duly cleared through the customs.

performance under this Act, including Section 27 and Section 29<sup>310</sup> is considered as the criminal offence, even if there is criminal intent or action by negligence. However, the Supreme Court, Decision No. 692/2538<sup>311</sup> reviewed with adjudication of the Customs Act, B.E. 2469 (1926), “Section 16 which is not excluded Intent of tax cheating”, the component of criminal offence under the Customs Act, B.E. 2469 (1926) , Section 27. The court case according to the Act adjudicated by the Supreme Court indicated the defendant does not deliberately cheat on the tax, it is no criminal offence against the defendant. The law also is applied to the criminal offence against the juristic person since it is no intent of the criminal offence under the Panel Code, Section 59<sup>312</sup>. Apart from that, when the criminal offence requires no intent, it is no need to apply with the Civil and Commercial Code, Section 70 which provides that the criminal offence against the juristic person is more sufficient to be charged with.

Besides, consider the issue regarding the intent of criminal offence in Thailand. The Criminal Code in Thailand does not provide intent of the performance.

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<sup>310</sup> The Customs Act, B.E. 2469 (1926)

Section 27 Any person imports or brings into the Kingdom any tax unpaid, restricted, or prohibited goods, or any goods which has not duly passed through the customs, or exports or takes such goods out of the Kingdom or assists in any way in importing or exporting or removing or assisting to removal without permission from any ship, quay, godown, warehouse, place of security, or store room, or provide the place to keep, or conceals such goods, or permits or arranges other persons to do so or is involved in any manner in carrying, removing, or dealing with such goods in any manner to avoid or attempt to avoid the payment of customs tax or of any duties of avoid or attempt to avoid any provisions of law and restrictions relating to the importation, exportation, landing, warehousing, and delivery of goods with the intention to defraud the government tax of His Majesty the King with must be paid for such goods or avoids the prohibition or restriction of such goods, for each offence there shall be a fine of four times the amount of price of the goods including duty or to imprisonment for a term of not exceeding ten years, or to both. As amended by section 3 of the Customs Act (No.11), B.E. 2490 (1947).

Section 29 If any vessel shall be found to have on board any secret or disguised place or any device adapted for smuggling goods, the master shall be liable to a fine not exceeding five hundred thousand Baht. However, the master shall not bear punishment unless there are reasonable grounds to believe that he failed to exercise proper vigilance to prevent, or was involved in or privy to the construction, adaptation, placing, or using such place or device. The place or device shall be destroyed or rendered harmless to the satisfaction of the competent official.

<sup>311</sup> See Supreme Court, Decision No. 692/2538, Thai Language Version, (<http://www.deka.in.th/view-55600.html>).

<sup>312</sup> See Footnote No. 240

Although, the intent of the corporate representative is considered as it is of the juristic person. The adjudication of the Thai Court reviewed an application of the Civil and Commercial Law, Section 70<sup>313</sup> in that the juristic person is considered as the intent of criminal offence and the intent of the corporate representative is as of the juristic person per the Supreme Court, Decisions No. 787/2506 for norm till today<sup>314</sup>. The judge in the Supreme Court reviewed that when the corporate representative is authorized by the objectives of the juristic person, the intent is engaged with the juristic person and as of it. It is under the concept of *Alter Ego* applied by the British Court in *R. v. I.C.R. Haulage Ltd.* Thai Court reviewed that the juristic person may act deliberately by the component of the criminal offence and the criminal ground charged is considered as criminal intent under the component of action<sup>315</sup>.

The application of the Civil and Commercial Code, Section 70 by Thai Court is required in order to the juristic person is put against the criminal offence and the attempt of applying it which shall include other intent of the criminal offences as many as the law related to no criminal offence against the juristic person in particular. The law indication will influence on preventing the juristic person from being deprived of the Criminal Law when the criminal offence is not put against the juristic person in particular. Generally, the practice of the court may oppose to the legal method for dissolving the case under the Civil Law System whereas the legislative is required for reviewing the law<sup>316</sup>. Under the Criminal Law, the judge should not apply the Civil and Commercial Code, Section 4<sup>317</sup> for covering up under the criminal offence since the

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<sup>313</sup> See Footnote No. 285

<sup>314</sup> See Footnote No. 151

<sup>315</sup> Khanna, V. S., "Corporate Criminal Liability: What Purpose Does It Serve?," [Harvard Law Review](#).

<sup>316</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," [Washington University Global Study of Laws Review](#).

<sup>317</sup> Thailand Civil and Commercial Code, Section 4 The law must be applied in all cases which comes within the letter and spirit of any of its provisions.

law provides the criminal offence in particular. When the trial is carried out with doubts, the court shall dismiss as the benefit of the doubt by law. In fact, the concept of the vicarious liability is the Civil Law-based. In the Civil and Commercial Code, Section 42<sup>318</sup>, and Section 428<sup>319</sup> relate to the offence of the infringement is put in a more specific law, especially Section 76<sup>320</sup> on the infringement of the juristic person by the corporate representative against the other party shall be compensated accordingly by law, which it is evident that the Civil Law usually provides the offence of the infringement against it. The adjudication of Thai Court has been observed by the application of the Civil Law for the criminal offence when the relative law is not provided to the application<sup>321</sup>.

In terms of intent of a more specific criminal offence in Thailand, The Supreme Court, Decisions No. 97/2518<sup>322</sup> was adjudicated that the intent of a more specific criminal offence performed by the corporate representative was as of the juristic person and the penalty sentence of the company, as the juristic person for the criminal ground of the public cheating and fraud, Section 343 probing the juristic person whose intent was “ill-gotten” or “malice” acted deliberately by malice aforethought. The idea of the fictitious person of the perceived juristic person may be in controversy since the juristic person may not be conscious in the same way of the

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Where no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.

<sup>318</sup> Thailand Civil and Commercial Code, Section 42 If a person selects any place with manifest intention of making it a special domicile for any act, which is deemed to be the domicile in respect to such act.

<sup>319</sup> Thailand Civil and Commercial Code, Section 428 An employer is not liable for damage done by the contractor to a third person in the course of the work, unless the employer was at fault in regard to the word ordered or to his instructions or to the selection of the contractor.

<sup>320</sup> See Footnote No. 71

<sup>321</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review.

<sup>322</sup> See Supreme Court, Decisions No. 97/2518, Thai Language Version, (<http://www.deka.in.th/view-40786.html>).

individual person<sup>323</sup>. Supposedly, when the juristic person is mentally-ill, it is logical if the conditions are as of the corporate representative. It is assumed that the intent of the criminal offence against the juristic person is not properly applied when the intent of a more specific criminal offence may be an anticipation of more debates since there is no principle of law for an application. Basically, the juristic person consisting of a mere asset is created by law as for a certain support of its duty<sup>324</sup>.

Focus on the offences committed by negligence in Thailand can be explained that, the Penal Code provides offences committed by negligence in distinction of degrees; against the manslaughter in Section 291 and grievous bodily harm under Section 300<sup>325</sup>, for instance. The negligent offence by the Penal Code, Section 59 para 4 providing that the no intent of criminal offence defines as the action with no reasonable diligence causing to the unexpected evidence. The due care is not obviously observed as in the proper precaution by the actor.<sup>326</sup>

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<sup>323</sup> Thailand Penal Code, Section 343 If the offence under Section 341 be committed by the assertion of a falsehood to the public or by the concealment of the facts which should be revealed to the public, the offender shall be punished with imprisonment not exceeding five years or fined not exceeding ten thousand Baht, or both.

If the offence mentioned in the first paragraph be committed under the circumstances mentioned in any sub-section of Section 342 also, the offender shall be punished with imprisonment of six months to seven years and fined of one thousand to fourteen thousand Baht.

<sup>324</sup> L. Jordaan, "New Perspectives on the Criminal Liability of Corporate Bodies," Acta Juridica, (2003): 48-71.

<sup>325</sup> Thailand Penal Code

Section 291 Whoever, doing the act by negligence and that act causing the other person to death, shall be imprisoned not out of ten years or fined not out of twenty thousand Baht.

Section 300 Whoever, committing the act by negligence and such act to cause the grievous bodily harm to the other person, shall be imprisoned three years or fined not out of six thousand Baht, or both.

<sup>326</sup> Thailand Penal Code, Section 59 para 4 To commit an act by negligence is to commit an offence unintentionally but without exercising such care as might be expected from a person under such condition and circumstances, and the doer could exercise such care but did not do so sufficiently.

Moreover, the notable case appeared that the loading cooking gas tanks truck of the Siam Gas Industry Co., Ltd. exploded in massive flame from the overturned vehicle on September 24, 1990 (B.E. 2533) killing the great numbers of people and severe casualty including loss of private and public property. The state prosecutor put the charge against the first defendant “the Siam Gas Industry Co., Ltd.” and the second defendant “the managing director” against the manslaughter ground (Section 291) and the grievous bodily harm (Section 300) and causing fire by negligence or impact to the life of the other person (Section 225). The trials were in sequence from the first to the Supreme Court which was by the Supreme Court, Decisions No. 3446/2537 reviewed partly that:<sup>327</sup> “even, the manslaughter offence against Mr. Sutan, the employee of the first defendant “the Siam Gas Industry Co., Ltd.” who drove that overturned loading vehicle causing to the release of the gas tanks from the truck igniting the leaking gas into flame before the massive explosion taking lives of people in great numbers and casualty including other’s private and public property shall be applied, the affected evidence from the accident was partly executed by the first defendant associated with the negligent offence performed by the driver, Mr. Sutan according to what it was testified by the defendants. It was heard that if the first defendant operated under the Ministerial Regulation and Notification of Department of Public Works and Town & Country Planning on Rules and Method of the installation of the gas storage tank, features and the internal specification of the storage tank, the catastrophe would not occur. And even the installation of the storage gas tank on the loading truck was built prior to the promulgation of the Ministerial Regulation No.10, B.E. 2529 (1986)<sup>328</sup>, the effective regulation provides mandate of obligation on the owner or the possessor of the vehicle to fix accordingly within 365 days since the publication was on August 19<sup>th</sup>, B.E. 2529 (1986) in the government gazette. The disobedient defendant has been evident

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<sup>327</sup> Evaluated from Supreme Court No. 3446/2537.

<sup>328</sup> See Ministerial Regulations No. 10, B.E. 2529 (1986) English Language Version, ([http://www.wipo.int/wipolex/en/text.jsp?file\\_id=129775](http://www.wipo.int/wipolex/en/text.jsp?file_id=129775) ).

is the amount of year that the car has been used (in this case is over 3 years) before the massive accident. The first defendant was under the offences committed by negligence against the trader and transporter of inflammable and hazardous gas, which shall be applicable by the capacity and circumstance of the first defendant whose career requires expertise. The performance of the defendants caused massive loss of life and property. Hence, the first defendant and the second defendant are guilty against the criminal charge.”<sup>329</sup>

However, the Supreme Court decision indicated the defendant who done conflict by the law must be jailed for 2 years and 20,000 Baht fines under Section 291 against both defendants but the imprisonment sentence is suspended for three years. The discussion is the judge mentioned the first defendant as the juristic person who indicate the act of the juristic person which relate what the juristic person shall do accordingly by human’s behavior<sup>330</sup>.

Being considered under the Criminal Law, Section 59 para 4, the reasonable diligence is only acted by the individual person who possesses both “capacity” describing the “nature” which is inside (mind) and “circumstance” meaning “the existing evidence” which is a surrounding outside. The Supreme Court, Decision No. 3446/2537 reviewed according to the capacity and circumstance of the non-existing being like the juristic person and the Supreme Court, Decision No.787/2506 was also not applicable to the proceeding against the offences committed by negligence since the case of the Supreme Court, Decision No. 787/2506 involved with the criminal intent but the court applied the Civil and Commercial Code Section 70 para 2, of which the concept is all about an offence of the infringement. In conclusion, the Supreme Court, Decision No. 3446/2537 reviewed on the offences committed by negligence against the offender

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<sup>329</sup> *Ibid.*

<sup>330</sup> *See* Footnote No. 18

applied with none-relative laws provided under the Civil and Criminal Laws supported by “capacity and circumstance” against the corporate representative as of the juristic person.

At the same time, the unsettled controversy of the criminal offence may cause more disputation if the criminal offence was extensively put against the juristic person who has been guilty as charged under none relative laws against a specific criminal offence. When the law is extensively expanded to the penalty of the offences committed by negligence, the conventional offence under the Penal Code is not likely provided with supports from the “will” of the legislative or even “terminology” All are not rational when the Supreme Court, Decisions No. 3446/2537 had put penalty measure which was not corresponding to the massive loss. The penalty was not applied properly against the charge of the criminal offence<sup>331</sup>.

Furthermore, the 3 cases; Klong Dan Project, Credit Union Klong Jan, and the Rai Som, are involved in criminal offenses by legal representative whom represents the intention of the given juristic person and higher executive officials whom hold the power to check, control, maintain, and manage the given organization i.e. juristic person or hold the major duty to run the juristic person, they are literally the juristic person. Therefore, the action of juristic persons shall be performed by these higher executive representatives. For example, the offenders could be the chairman of a union, committees, directors, higher officials, or higher politicians. Therefore, the offenses are performed by the juristic persons and not subjected under the liability for offense of employee principle. In addition, the juristic persons committing offenses shall be punished on direct criminal charge for juristic persons. However, there is not yet such criminal charges or appropriate charges in Thailand for juristic persons. For instance,

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<sup>331</sup> Analyzed from Supreme Court, Decision No. 3446/2537.

the Criminal Code, Section 18<sup>332</sup> holds only fine and confiscation of property on juristic persons, such penalty is not adequate for the damages done to the outsiders in such an extensive effect.

Therefore, Thailand shall look for a possible path and appropriate rules for law enactment and legal enforcement i.e. criminal punishment to juristic persons or employers. This shall promote realization of carefulness and prevention, the fear for criminal charges which are likely to affect the business operation i.e. pause, close down, bad reputations or reliability, serious amount of fines, confiscation or appropriate punishment which directly affect the given juristic persons or employers. In addition, the more strict legislation or measure which is compatible with criminal offenses of juristic persons according to legal principle of the overseas shall too be well-applied in order to resolve the inappropriateness and vagueness of Thai criminal offenses for juristic persons. Such alteration shall be later further amended in the Criminal Code.

From Siam Gas, Klong Dan Project, Credit Union Klong Jan and Rai Som cases, the author identifies the differences of criminal liability of juristic persons as the followings;

1. **Ordinary Worker:** the role of ordinary workers is clearly unimportant to the action or the use of authority of juristic persons in accordance to objectives or jurisdiction of juristic persons. With the absence of such ordinary worker, the main mission of the juristic person is not affected by such absence. For example in Siam Gas Case, the juristic person was liable for the negligence of its directors with inadequate care for damages which

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<sup>332</sup> See footnote No. 169

could occurred according to the circumstances of the profession. However, the juristic person was not liable for the negligence of an employee who was a driver of the company because the employee was neither a higher official nor held any administrative power of the organization or juristic person.

2. **Legal Representative:** this is a representative of organization or juristic person, holds power to act in accordance to objectives of the juristic person. Thus, the position has major role on administration and business of the juristic person. For example, managing director, manager, president, chief executive officer, chief operating officer, the other major positions, etc. Therefore, as the legal representative of the juristic person is receives criminal liability, the juristic person shall be at direct criminal liability as well.

Hence, Ordinary Worker and Legal Representative are different in duty and authority which are related to the given juristic person. If juristic person must be liable for the offense of a lower rank staff whose work is not essential to objectives or authorities of the juristic person, the case would not be compatible to the principle of liability of action of juristic person. This is because the action of a person who is not a representative of the juristic person is not the action of that juristic person. Therefore, the author considers to take in discretion of portion of relation between duty role of positions of person as objectives or authority of juristic person by considering if such person holds a role or duty which may consider to be essential of business or authorization of such juristic person in accordance to the objectives or duty of such juristic person.

#### 2.4 Principle of Vicarious Criminal Liability of Organizations in Thailand

The Penal Law of Thailand have a distinctive principle to begin with. Only if, there is no more specific law, it is unwise to apply both as inter - disciplinary practice. The concept of vicarious liability has been supported in the Civil Law which related to the offences of the infringement; the employer is put against the punishment for the

infringement of the employee under the Civil and Commercial Code, Section 425<sup>333</sup> when Section 76 provides the relationship between the juristic person and the corporate representative. The Civil Law always provides offences of the infringement on a certain relative law which provides no offences of the infringement against any persons. While, the principle of the Civil Law has provided the practical provisions with a certain purpose; for loss and compensation. Wattanarung (2014) explains the concept of the vicarious liability is not properly applicable in the Criminal Law. The current of Constitution of the Kingdom of Thailand B.E. 2540 (1997), Section 32<sup>334</sup> is evident when the concept applied may have opposed against it.

The concept is adjustable under the Civil and Commercial Code, Article 425 on the offence of the infringement by the employer and the employee when the performance of the employee causes to the civil ground. In addition, the Civil and Commercial Code, Section 76 on the performance of the corporate representative as the juristic person who causes to loss of other party. The juristic person is responsible for the damages<sup>335</sup>.

The vicarious liability is doubtful since it is not provided in the criminal law. Supposedly, the employer may involve with the criminal offence if it is proven that the employer is master minded, engaged with a making use of the employee or in abet. The criminal component is sufficient enough to be determined as personal criminal offence of the employer alone.

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<sup>333</sup> Thailand Civil and Commercial Code, Section 425 An employer is jointly liable with his employee for the consequences of a wrongful act committed by such an employee in the course of his employment.

<sup>334</sup> Constitution of the Kingdom of Thailand, B.E. 2540 (1997), Section 32 No person shall be inflicted with a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and imposes a punishment therefore, and the punishment to be inflicted on such person shall not be heavier than that provided by the law in force at the time of the commission of the offence.

<sup>335</sup> A. Wattanarung, "Corporate Criminal Liability in Thailand' (2014) Thai Language Version, (Www.Bpp.Go.Th).(2014).

Thailand has followed the trend on the criminal offence against the juristic person by amendment to the Penal Code that covering an offence of partnership, company, association and foundation. In fact, there are a few court cases involving the criminal offence of the juristic person. The first trial began with the Supreme Court, Decision No. 841-842/2469<sup>336</sup> against the violation by the first defendant, the company as the mineral lease holder and the second defendant, the employee who was authorized to operate in the mining field upon a wrongdoing in releasing water from tabs and dumping ores wastes into the water bed under Section 64 of the Mining Act, B.E. 2461 (1918)<sup>337</sup>. The Decision of Supreme Court made a consideration on only the first defendant as the mineral lease holder while the second defendant who was not the mineral lease holder<sup>338</sup>. The next court case was a judgment of the Supreme Court, Decisions No. 265/2473<sup>339</sup> against the criminal offence performed by the owner as the juristic person of one newspaper on the defamation ground under Section 282 under the Penal Code<sup>340</sup>. It is noted that even the court applied the criminal measure; the penalty

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<sup>336</sup> See Supreme Court, Decision No. 841-842/2469, Thai Language Version, (<http://www.deka.in.th/view-257668.html>).

<sup>337</sup> Mining Act, B.E. 2461 (1918), Section 64 The holder of a Prathanabat shall not dam up or draw water from a public waterway, regardless of whether such a waterway is within or outside of the mining area, unless he has obtained a licence from the Local Mineral Industry Official and he complies with the conditions prescribed in such a licence.

An application for a licence to dam up or draw water from a public waterway must be submitted with a map and detailed explanations regarding the procedure for damming up or drawing water.

<sup>338</sup> S. Manomaiudom, "Corporate Criminal Liability (1977) " Thai Language Version, Laws Journal., 3(2) (1977): 137.

<sup>339</sup> See Supreme Court, Decision No. 265/2473, Thai Language Version, (<http://www.deka.in.th/view-72095.html>).

<sup>340</sup> Thailand Penal Code, Section 282 Whoever, in order to gratify the sexual desire of another person, procures, seduces or takes away for indecent act the man or woman with his or her consent, shall be punished with imprisonment of one to ten years and fined of two thousand to twenty thousand Baht.

If the commission of the offence according to the first paragraph is occurred to the person over fifteen years but not yet over eighteen years of age, the offender shall be punished with imprisonment of three to fifteen years and fined of six thousand to thirty thousand Baht.

If the commission of the offence according to the first paragraph is occurred to the child not yet over fifteen years of age, the offender shall be punished with imprisonment of five to twenty years and fined of ten thousand to forty thousand Baht. Whoever, in order to gratify the sexual desire of another

is implemented under the publishing act which is more specific measure on the criminal matter. Even, the actor is not deliberated in crime as it is applied, the principle of adjudication concerns with no criminal juristic person as general crimes which the actor must be committed deliberately<sup>341</sup>.

Later, the Penal Code is applied instead of the dismissed criminal measure alone in 1956 (B.E. 2499) as well as an offence of partnership and company which are not added in the next Penal Code. In 1956 (B.E.2499), the partnership, company, association and foundation act are applied to replace the former acts. Regarding, Thailand issuing a separate act to be in application against an offence of partnership, company, association and foundation, it is likely to limit a criminal offence of the juristic person when it is required to doing or not doing by the company under the criminal measure. Having the adjudication of the Supreme Court considered after the law indication has been used. This issue can focus on the controversial terms applied by the judge and the law drafter in that the court viewed on the broader offence of the criminal juristic person. The theory of law under concept of the personality of the juristic person with soul and mentality is not really brought into consideration by the Thailand's Judiciary System<sup>342</sup>.

Whereas the criminal juristic person; the legal term “any person” can be related to the criminal act consideration, which is not defined to more specific or else means either the ordinary person or the juristic person.

The Supreme Court, Decision No. 185/2489<sup>343</sup> in corresponding to the Supreme Court, Decision No. 841-842/2469 ruled the limited company as the defendant who was

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person, obtains the person who is procured, seduced or taken away according to the first, second or third paragraph or supports in such commission of offence, shall be liable to the punishment as provided in the first, second or third paragraph, as the case may be.

<sup>341</sup> See Supreme Court, Decision No. 267/2473, Thai Language Version, (<http://www.deka.in.th/view-72102.html>).

<sup>342</sup> Thailand Criminal Code, B.E. 2499 (1956).

<sup>343</sup> See Supreme Court, Decisions No. 185/2489, Thai Language Version,

given the mineral lease with offence of monthly false statement for mining work and distribution against Section 35 under the Mining Act, B.E. 2461 (1918)<sup>344</sup>. Although, the statement was submitted by the company's manager, the person who relate to the wrongful act is the company, shall not be the manager. In the adjudication, it read "due to the first defendant as the juristic person, the accounting management is responsible by the firm committee or the manager which can be called defendant who is to be responsible for the performance of the committee or the manager through all means. Thus, the first defendant is guilty."<sup>345</sup>

In some court cases, the court has brought in the criminal offence of general ground against the juristic person. The crimes which require deliberation include defamation or counterfeit brandname which is referred to the Supreme Court, Decision No. 787/2506 reading that the execution of the company is considered covering the objectives of the defendant who regains some benefits from them (counterfeit brand name) associated with the authorization of the corporate agent whose company is found guilty<sup>346</sup>.

The debates begin with the adjudication of the decision of Supreme Court in a criminal offence against the company performed under the objectives and with the authorization of the corporate agent. The point is a criminal offence related to the counterfeiting or brandname of the other is executed. Hence, the company may be

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(<http://www.deka.in.th/view-49671.html>).

<sup>344</sup> Mining Act, B.E. 2461 (1918) Section 35, A Special Atchayabat shall not be issued to include the area already covered by any other Exclusive Prospecting Atchayabat, Special Atchayabat, Provisional Prathanabat or Prathanabat.

If parts of the area applied for cover the area of any existing Exclusive Prospecting Atchayabat, Special Atchayabat, Provisional Prathanabat or Prathanabat, the issue of the Special Atchayabat shall be made only by excluding such an area.

*(As amended by Section 12. of the Minerals Act No.2. B.E. 2516)*

<sup>345</sup> B. Sudti-autasilp, Report No. 76.

<sup>346</sup> See Footnote No. 151

grounded as illegally implementing objectives, or related to the firm objectives are interpreted under the criminal offence. Generally, the point of this statement is the juristic person does not have ability to perform by the objectives. In consequence, the way of the execution of the corporate agent is related to the juristic person when the authorization is considered as illegal performance<sup>347</sup>. At the same issue, Konov (2012)<sup>348</sup> explains the rationality adjudicated by the Supreme Court judge was not sufficient. Even though, it was the first judgment which provided more perfect evidences of criminal deliberation. The element under the criminal offence may possibly be analyzed through the entire lawful objectives set up by the juristic person to keep the management apart from them as the business performance can be either legal or illegal. The author may suggest to keep them separated, despite the separation may cause to other disputation since the corporate agent may have performed illegally if the business performance is not followed by the whole objectives. How is this element engaged with the juristic person?

Regarding the adjudication of the Supreme Court, Decision No. 787/2506. The court has attempted on the consideration of the level of criminal offences against the juristic person including the deliberation of the business performance like offences relating to cheque, offences relating to certificate and alteration as well as the more specific deliberation of the offences of public cheating and fraud. For example; Judgment Doc No. 787/2506 "...it is proven that the first defendant "company" as the juristic person who performs business under its objectives expresses authorization given by the corporate agents. The facts provide that the second defendant as the managing director of the first defendant "company", who is authorized to order the payee cheque by an associate name of the third defendant as one of the company committee who both are engaged by agreement with Thai Military Bank Public

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<sup>347</sup> Rose-ackerman, S., "Corruption and the Criminal Law," Forum on Crime and Society.

<sup>348</sup> Konov, J., "Piercing the Veil's Effect on Corporate Human Rights Violations & International Corporate Crime (Human Trafficking, Slavery, Etc)" <[Http://Mpra.Ub.Uni-Muenchen.De](http://Mpra.Ub.Uni-Muenchen.De)) ([Http://Mpra.Ub.Uni-Muenchen.De/35714/1/Mpra\\_Paper\\_35714.Pdf](http://Mpra.Ub.Uni-Muenchen.De/35714/1/Mpra_Paper_35714.Pdf))".

Company Limited. It is found that the second defendant and the third defendant have signed to order the exceeding fund in the payee cheque's account. They deliberately performed to prevent the payee cheque from the use of cash fund. As a result, the second defendant associated with the first defendant and the third defendant are charged with the fault actions as actors.<sup>349</sup>

Again, the concept is not applicable to the general criminal offence when the person who is not guilty. However, is the accessory or involved with crime, the special law is required. It appears that the theory of the criminal law has been expanded and flexible especially, considered as the deliberation of individual person apart from the criminal offence. It is necessary to be carefully interpreted and applied.

Originally, a person has to be responsible for his or her own action. Later, the liability was developed. As a result, a person can have vicarious liability for other person's action because of commercial, industrial, and economic developments. To facilitate business operators, laws state the liability for wrongful acts taken by other persons, for example, in a case that an employer and his or her employee commit a violation together. This liability aims to easily find the responsible person(s) for the damage(s). According to Mays (1998)<sup>350</sup> states the principle of vicarious liability that:

“[A]s an employer is responsible for selecting, training and supervising the employee, not to mention placing the employee in a position where the offence can be committed, should not the employer also be responsible for the employee's crime? The case for liability becomes even more compelling when the employee has acted to benefit the company and the company has retained the profits generated by the wrongdoing.”

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<sup>349</sup> Statement taken by analyzing the court case, see Footnote No. 151

<sup>350</sup> H.R. Mays, "Corporation's Liability for Criminal Acts,"(Sweet&Maxwell, 1998).

Generally, any person who intentionally or negligently commits a violation or takes an action that causes any damage to other person(s) are penalized. This liability is based on fault. In other words, a sufferer can claim for any compensation, if he/she can prove the violation as well as his or her employee must also admit the violation of the employment contract. Then, the employer must be responsible for the violation by the employee that is not his or her own action. In a criminal case, the status of an employer and employee under an employment contract as well as the relationship between a violation, its consequence(s), and responsible person(s) are seriously considered<sup>351</sup>. By considering the liability of an employer and employee, we can say that the concept of the violation has been used for a long time. Originally, the definition of violation was different from the current one. Especially, modern laws aim to remedy sufferers as there is no damage to them. In the Roman period, the violation referred to a liability caused by an illegal action. The liability was not obviously separated into Civil and Criminal Liabilities as in the present time. The Civil Liability is caused by an illegal action such as violation. This violation leads to the responsibility of a violator to compensate a sufferer<sup>352</sup>.

In Thailand, violation is stated in Book 2 Title 5 of the Section 420. It states that “a[ny] person who intentionally or negligently takes any action with other person(s) that kills the latter person or affects his or her body, hygiene, freedom, asset, or right. The first person shall be fined for the action.” This is the definition of violation in Thai law. The essence of the definition can be divided as stated below<sup>353</sup>;

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<sup>351</sup> H.T. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," Minnesota Law Review, 75 (1991): 1095-1186.

<sup>352</sup> *Ibid.*

<sup>353</sup> Thailand Civil and Commercial Code, Section 420 A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

- (1) Person – any person who violates the Section 420 of the Civil and Commercial Code is considered as a person on the violation date must be responsible for the action. A natural person can break the laws, although the person is a minor, incompetent, or quasi-incompetent person. Even though, a juristic person has no heart and soul, the person can commit a violation through its representative(s).
  
- (2) Action – an action that affects to other person(s) must be consciously done by a person as he or she can control his or her body. Thinking is not considered as an action because it is in his or her mind. As long as, the person has not realized his or her idea, it is considered that is no action has been taken. An action that is unconsciously taken by the person also cannot be considered as an action. An action or movement innocently taken by a baby is not considered as an intentional movement. A movement caused by an illness and sleepwalking unconsciously taken are not considered as actions. A violation consciously committed by a mentally deficient person is not considered as a criminal action, but it violates Civil Laws.
  
- (3) Intention and negligence – the liability is based on fault. It is considered whether an action is intentionally or negligently taken. Intention has 2 definitions: a person's intention to cause any damage to other person(s), and the thought that his or her action may cause any damage to other person(s) without concerning the severity of the damage.

A negligence action refers to an action that is taken by a person without adequate carefulness. Generally, the person may unintentionally take the action with carefulness that is not adequate. Nevertheless, laws do not state the severity levels (i.e. normal or serious) of negligence. Hence, any negligence action can be considered as violation. Regarding carefulness, a worker must be careful, professional, or reasonable

person while he or she is doing his or her job that other person(s) cannot do. For the liability for violation, any person who causes any damage to other person(s) must be responsible for his or her action by compensating the latter person(s). This is equity for treating the damage(s) to the sufferer(s). Normally, a person must be responsible for his or her action. However, a juristic person must be responsible for its representative's action<sup>354</sup>.

Put differently, Diskant (2008)<sup>355</sup> explains laws state that a responsible person must have vicarious liability for a violation by other person(s) in some cases. Although, the first person does not involve in or acknowledge the violation, the person must be responsible for it. This is an exception of the general principle of the liability for the person's wrongful action. That is, the vicarious liability is an exception of laws concerning liability for the person's wrongful action (i.e. "be responsible for what you have done"). However, this requires governing laws. The laws should also be interpreted carefully by considering reasons in order to protect sufferers who need remedies and fairness. Examples of the vicarious liability include the follow cases: 1) an employer is responsible for his or her employee's wrongful action, 2) a guardian is responsible for his or her child or incompetent person, 3) liability for a representative's wrongful action, or 4) a teacher, employer, or caretaker is responsible for an incompetent person.

- (1) Illegal action – an illegal action does not only refer to an action that breaks a law, it also implicitly refers to an action taken by a person who does not have the right or duty to do so. However, the person does not have liability for an action that causes the damage(s) to other person(s) if he or she is legally

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<sup>354</sup> Bucy, H. T., "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," Minnesota Law Review.

<sup>355</sup> B.E. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," The Yale Law Journal, 118 (2008): 128-176.

authorized or has the right to take the action. Nevertheless, the action is considered as violation if it only leads to the damage(s).

- (2) Damage(s) to other person(s) – a person has liability for an action only if it is an intentional or negligence action that damages other person(s). It can say that, there is no liability if the action does not cause any damage. Regarding this issue, under Section 420 of the Civil and Commercial Code states that “...if an action causes death or damages a person’s hygiene, freedom, asset, or right, then the person who takes the action shall be penalized”.<sup>356</sup> The damage(s) to any person(s) may causes death or damage the person’s hygiene, freedom, asset, or right protected by laws of violation. If a person violates the laws, then the person must be penalized<sup>357</sup>.

Moreover, consider the theories of vicarious liability and primary liability for criminal penalty to the juristic person in Thailand can be explained that the concept of the criminal offence is based on the current of Constitution of the Kingdom of Thailand, B.E. 2540 (1997), Section 32 on “any individual person shall not put punishment against the criminal offence but shall be only if the guilty action is provided with a degree of punishment by law.”<sup>358</sup> From this grounded element, the author does not agree with the concept of vicarious liability which the criminal offence is charged against any individual persons whose criminal offence is caused by the other party to be applied in the Penal Code<sup>359</sup>.

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<sup>356</sup> See Footnote No. 343

<sup>357</sup> *Ibid.*

<sup>358</sup> See Footnote No. 180

<sup>359</sup> N.P. Biriukov, "The Problem of Criminal Liability of Legal Person in Russia " US-China Law Review, , 10(6) (2013): 527-548.

Similarly, the concept of vicarious liability is not practical. Since, it is prior to identify if the existing being of the juristic person related to its existence by different laws. In fact, the relationship between the juristic person and other party in many forms are provided in details by law of the partnerships. While, the relative laws seem to be a lack of curving measures on it more or less. The relationship between them varies the provision in the Civil and Commercial Code, book 1, Section 2 in the first part which is provided for the application of the broader components for the juristic person, for example, the ministry, division, department, monastery, association, foundation and political party<sup>360</sup>. In reviews of an application of the vicarious liability-based in the criminal matters, supposedly, the extra judicially killing achieved by any police officer with no authorization whether the Royal Thai Police Headquarter is found guilty.

Moreover, the municipal employee is put criminal negligence while driving or at working in-scope of his or her duty-work or corruption whether the municipality is put against the criminal offence<sup>361</sup>. The vicarious liability applied is mainly covered in the partnerships and companies as the juristic person, so the limit of the application of it results. When the overlook of the criminal offence against the juristic person is reviewed, the disadvantage of the vicarious liability may not be improper method of the criminal offence<sup>362</sup>.

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<sup>360</sup> See Footnote No. 194

<sup>361</sup> J.A. Graham, "Criminal Liability of Spouse for Theft of the Other Spouse's Property," St. John's Law Review, (1941): 78-90.

<sup>362</sup> C. Roxin, "The Dogmatic Structure of Criminal Liability in Thai General Part of the Draft Israeli Penal Code: A Comparison with German Law," Israel Law Review, 30 (1996): 60-81.

CHAPTER 3  
CONCEPT OF CORPORATE CRIMINAL LIABILITY  
UNDER FOREIGN LAWS

3.1 Introduction

In Chapter 2, the researcher gave examples of the countries that use the same Civil Laws of Thailand as the cases studies. The countries included France, Japan, and Germany, respectively. These countries were considered because the researcher wanted to show that the laws regarding Corporate Criminal Liability are similarly used in Thailand and those countries in order to judge civil and criminal actions. In other words, these laws are not new to the countries. In the three mentioned countries, the laws clearly stated the criminal punishment for the juristic person. However, the researcher only considered French and German laws in Chapter 3 in order to explain about the considerations of criminal actions taken by the juristic person regarding labor relationship. The United States and Japan were not included in Chapter 3 because although, the two countries have criminal punishment for the juristic person, the juristic persons are only penalized for their wrongful actions in these countries. The mentioned penalties are civil ones. That is, the juristic person and their representatives are not really punished because those countries follow the concept of *Mens rea* (criminal intention). In those countries, their laws consider that the juristic person has no life and consciousness as well as it cannot make any decision by itself. To make a decision, it must be done by its representative. Consequently, only penalties are applicable for juristic persons<sup>363</sup>.

The researcher includes the German law in Chapter 3 because Germany also uses the Civil Law as well as it has clear and similar criminal punishment to France.

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<sup>363</sup> Brooks, D. S., and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," Defense Counsel Journal.

The researcher does not include the United States and Japan in Chapter 3 because these countries do not have obvious and unique laws regarding criminal punishment that can be applied to Thailand in order to maximise possible benefits for the country. Accordingly, it can be stated that Thai laws regarding criminal punishment are similar to the American and Japanese laws, but they are different from the French and German laws. Therefore, the researcher focuses on presenting laws about violation and vicarious liability in this chapter by using the French and German laws as case studies and analyzed them. The information about these laws are collected from documents, other case studies, and relevant materials in order to provide complete and understandable information as much as possible.

The juristic person was literately called “artificial being” when the phrase later was regarded as “fictitious Person”. The idealistic alias is believed to become paraphrased since the period of Pope Innocent IV. From earlier 19 when it occurred the theory of law related to the rising Realism Theory, the jurist appeared not to be concerned with the fictitious person. Meanwhile, the Realism Theory suggested that the debates of the juristic person were likely to be dissolved with the discarding on a status of the juristic person. Hence, the passive acts of the juristic person involved the idealistic discipline and without the status and the execution of the juristic person through means<sup>364</sup>.

In terms of types of the criminal offence against the juristic person; Due to the requirement of the legitimacy of modern economy-based crimes, the type of the criminal offence against the juristic person is a necessary evil. What the inapplicable criminal offence had occurred was not helpful since the complex economy and politics may allow some mechanism used by the juristic person to gain illegal profits? The offence of the infringement on legalised agreements is proven insufficiently to be applied against the offender while the Civil Code is based on the disputation between

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<sup>364</sup> Brodowski, D., Espinoza, M., and Tiedemann, K. , "Regulation Corporate Criminal Liability: An Introduction," Switzerland: Springer International Publishing. .

the people and only the individual person who is entitled to claim the offensive charge against the juristic person for his or her loss. Besides, the requirement on the certainty of the criminal offence against the juristic person is obligatory. When the existing Criminal Law has not been amended properly, the rules and the application of law for their own legitimacy are potentially prerequisite<sup>365</sup>.

Practically, the contemporary solicitors have something in common as the establishment of the juristic person accommodates with legalised group of the ordinary persons whose responsive objectives are not limited to claims and liability. The corporate jurist can be defined as a body of persons authorized by law who performs actions on behalf of several ordinary persons in them<sup>366</sup>.

In consequence, the ordinary persons in a legalised group always react to something or someone for claims and liability in more complexity rather than that of a single ordinary person because of their own geography and individuality in distinction. The priority concerns mainly with benefits and powers in a decision making which is considered as if executed by a relatively lawful group. The foundation of arising problems begins with how the inter-disciplinary engagement among ordinary persons in a body of persons can be applied to the interactions of external persons and their arranged assets are apparently like. More importantly, if any person in an established body is enable to solve the liability, torts and even a criminal dispute will show benefits or loses are shared or responded<sup>367</sup>.

The solutions are bound with practically legal procedures and rules in more specific ways. The relative laws for a body of persons, partners and corporations are invented in order to the corporate business can be acquired for individual person who

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<sup>365</sup> Koessler, M., "The Person in Imagination or Persona Ficta of the Corporation," Louisiana Law Review.

<sup>366</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " American Criminal Law Review.

<sup>367</sup> See Footnote No. 315

demands the other persons on the same investment to found the commercial business establishment. Therefore, the law is enabled to provide right and duty for a body of persons as if it is ordinary person. To be more precise, the juristic person may have its identity of the citizenship based on the states when it is capable to obtain any assets, to become creditors and debtors and to prosecute or be prosecuted like an ordinary person.

However, not all right and duty are served but only for the ordinary person by nature. It is noted that all claims and liabilities engaged can be responsible by ordinary person. Even though, the juristic person is equal to the ordinary person since benefits, offences, profits or losses are all human's concerns, describing that a legalised group to become the juristic person contains the individual person who is engaged to gain profits is really a mechanism to perform or act in a guise of the juristic person. In another word, the juristic person is not but an implementing tool for man.

Over viewing from many aspects of the meaning of the juristic person, it is obvious that the juristic person is fictitious person who is incapable to possibly accomplish the tasks by itself but through the reaction of ordinary person for real. How can this be determined?

By law, any responsive actions under the juristic person are determined by the assigned person or persons of a legalised group. Regarding the form of company, it is the committee selected by the shareholders. A sample case in the British Court; *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co., Ltd. (1915)*<sup>368</sup>, the court referred to person or body of persons stating that "The company is abstract noun with no spirit or soul and no physical body. The spirit of the company is aimed at numbers of person

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<sup>368</sup> Ian Tunstall, "Lennard's Carrying Co., Ltd. V. Asiatic Petroleum Co., Ltd. (1915) Stated: A Corporation Is an Abstraction. It Has No Mind of Its Own Any More Than It Has a Body of Its Own; Its Active and Directing Will Must Consequently Be Sought in the Person of Somebody Who for Some Purposes May Be Called an Agent, but Who Is Really the Directing Mind and Will of the Corporation, the Very Ego and Center of the Personality of the Corporation. Corporate Responsibility: The Duties and Liabilities of the Corporation (E.G.Legallaw.Comiantunstall)(Http://Iantunstall.Com.Au/Wp-Content/Uploads/Whitepapers/Corporate\_Responsibility.Pdf) ".

whose thought and soul is a back bone of the corporate firm. It is a self-centered to express the corporate personality”<sup>369</sup>. Similarly, the judge added that “Any person may be dominated by numbers of shareholders in the general meeting, who may be member of the committee. In some other company, any person may be authorized by the committee in an application of the firm regulations and even appointed by shareholders in the general meeting.”

As the results, only if the actions and the objectives achieved by the juristic person are lawful. The actions are obliged to legal engagement as if it is executed by the juristic person. The next issue arises when it is supposedly the corporate representative is not lawful, the level of the actions will be engaged by the juristic person. It is determined prior to solving problem if the corporate representative is authorized to do illegally actions. It seems this to be declined as irrelevant matter. Thus, it must be considered that the representative of the juristic person shall not be considered as an offender. It is suggested that the unlawful manner executed by the corporate representative is not engaged to become actions of the juristic person. The important point that can be used as the information to indicate the offence of the juristic person is the role or power of those juristic person within an organization. However, the authority must be conflicted by the law. It is obliged if the juristic person is deserved to receive the penalty or it tends to follow the evidences regardless the status of the juristic person. Alternatively, when it is considered as the juristic person’s actions, whose objectives are subjected to achieve into the person who is the person that have the authority to make decisions in the company.

The principle of the Penal Code is determined by the delinquency of the person who is penalized. The controversy of penal sentences for the juristic person is rooted

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<sup>369</sup> See case "Lennard's Carrying Co., Ltd. V. Asiatic Petroleum Co., Ltd. (1915), English Language Version, ([Http://Www.Lawteacher.Net/Free-Law-Essays/Business-Law/Previously-under-the-Common-Law-Law-Essays.Php](http://www.lawteacher.net/free-law-essays/business-law/Previously-under-the-Common-Law-Law-Essays.php)).".

deep in the debated issue which leads to a problematic matter if the juristic person deserves to the penal offences.

### 3.2 Corporate Criminal Liability in the Common Law System

Considering the theoretical evolution of the Corporate Criminal Liability can be explained that, it is believed under the Common Law's Principle by the jurist that the juristic person is not engaged by law as a criminal offence and not limited to committing crimes. Lord Holt viewed on the adjudication through his interpretation in 1701, "The juristic person is not given criminal sentence but anyone in the committee is subjected to the penalty of crimes", which is a foundation of the non-existing and spiritual being. During the old times, the idea of criminal offence against the juristic person who possessed peculiar personality when compared to the ordinary person was not practical in change<sup>370</sup>.

The criminal court trial was stringent in practice before the defendant, which was refrained from having the juristic person in the trial since its rigid body was not apparent to the judge and the litigant. The penalty against it; capital punishment and imprisonment were not possible in practice. The non-existing being of the juristic person was formerly perceived also as non-existing personality who was absolutely refrained from coming crime. Most jurists argued that the assumption of vicarious liability for crime was not acceptable since the convict would only be given penalty of the criminal offence. Other theory of law, for ultra vires was restricted to be rationales-base when is applied to describe the committing crime by the fictitious person as non-existing being<sup>371</sup>. The concept of the criminal offence against the juristic person has presently been changed dramatically.

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<sup>370</sup> A.P. Hamburger, "Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London V. Wood*" Columbia Law Review, , 94(7) (1994): 2091-2153.

<sup>371</sup> K.A. Swanson, "Cost of Doing Business: Corporate Vicarious Criminal Liability for the Negligent Discharge of Oil under the Clean Water Act," Washington Law Review, , 84(3) (2009): 555-580.

However, Glynn (2004)<sup>372</sup> stated that the Common Law-based solicitor has reviewed possibly several practical ideas against the criminal offence including committed deliberately crime performed by the juristic person. It is important understand how the rational ideas about the criminal offences and sentences against the juristic person have been evolved during the time periods.

### 3.2.1 The United States of America

Asst. Prof. Taweekiet Meenakanit<sup>373</sup> summarily explained about the Corporate Criminal Liability in common laws is that the first attempts to define the Corporate Criminal Liability were in countries such as England, the United States, and Canada that used the common laws because the industrial revolution originated in these countries. Alschuler (2009)<sup>374</sup> explained, in England, it was considered that a juristic person could not be punished for a criminal action because of many legal limitations. For example, it did not have a physical body and it was a creature of laws. Put differently, it could only take an action by using its right under the corporation's charter. Therefore, it could not commit a crime because any crime was necessarily ultra vires. It could not also present itself in a court. Additionally, it could not be punished in a case of a death penalty. Under common laws, a juristic person could not be punished for a criminal action, except in a case of vicarious liability that only covers unintentional actions of the juristic person<sup>375</sup>.

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<sup>372</sup> T.P. Glynn, "Beyond Unlimiting Shareholder Liability: Vicarious Tort Liability for Corporate Officers," Vanderbilt Law Review., 57(2) (2004): 329-434.

<sup>373</sup> Cited as R. Parnpan, "Ciminal Liability Thesis of Criminal Law, " ( Master Thammasat University., 2010).

<sup>374</sup> A. Alschuler, "Two Ways to Think About the Punishment of Corporations," Faculty Working Papers, Paper 192 (2009): 1191-1202.

<sup>375</sup> Pop, I.A.(2006)

In the case of *Mens rea*, the court eliminated the limitation by firstly using the “Identification Doctrine” in a civil case of *Lennard’s Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd (1915)*<sup>376</sup>. The doctrine was firstly used in a criminal case of *ICR Haulage Ltd. (1944)*<sup>377</sup>. In that case, the juristic person was punished. In facts, the company, and its director and other officers were sued for conspiracy to defraud. The court decided that the intention of the director was of the company, although the company could not have its own intention. Thus, the fraud committed by the director was considered as that of the company. However, Mays (1998)<sup>378</sup> explained regarding doctrine that “[A] company may in many ways be likened to the human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such.”<sup>379</sup>

At the same time, the case of *Lennard’s Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd. (1915)* also provided the idea of an Alter ego related to the vicarious liability as well. Haldane stated that; ‘[A] company is an abstraction. It has no mind of its own however a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very power and center of the

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<sup>376</sup> See Footnote No. 359

<sup>377</sup> H. Yarosky, "The Criminal Liability of Corporations' (N.D.) " McGill Law Journal, 10(2): 142-145.

<sup>378</sup> Mays, H. R., "Corporation’s Liability for Criminal Acts."

<sup>379</sup> W.S. Laufer, and Strudler, , "Corporate Intentionality, Desert, and Variants of Vicarious Liability," American Criminal Law Review, 37(4) (2000): 1258-1312.

personality of the corporation. That person may be under the direction of shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it may be so, that the person has an authority to co-ordinate with the board of directors given him to coordinate under the articles of association. It must be upon true construction of that section in such a case as the present one that the fault of somebody who is not merely a servant or agent for whom the company is liable because his action is the very action of the company itself<sup>380</sup>.

However, the principle of vicarious liability of the employment also stated in the case of *R v. St. Caldwell St. Lawrence Crop* which explained by Leigh that “The doctrine of identification originated as a device to ascribe order to hold them Civil liable. However, In Criminal Law, it tends to be assumed the doctrine means that for all purposes of criminal liability a corporation possesses a mind - that of its controllers. But, a court could return to the original root and hold the doctrine of identification should only apply to policy reasons, it is necessary to hold a corporation liable.”<sup>381</sup> So, it can said that the way to judge the Corporation Criminal Liability which similar to the case of *Tesco Supermarkets Ltd. v. Natrass Fisse* in the United Kingdom which explained that ‘Once a distinction is drawn between primary and vicarious liability, it clearly follows that the conduct of some servants or agents cannot be imputed to a corporation where primary liability is imposed. Authority is to the effect that primary liability (as opposed to vicarious liability) may be imposed in respect of the conduct of a managing director, a general manager, and even a secretary. Obviously, primary liability would be imposed in respect of the conduct of either the general meeting or the board of directors. However, no clear discrimination between superior and inferior agents or servants emerge from the case law.’ It can be said that the vicarious liability of the

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<sup>380</sup> *Ibid.*

<sup>381</sup> Oded, S., "Inducing Corporate Compliance: A Compound Corporate Liability Regime," *International Review of Law and Economics*, .

corporation should clearly consider primary liability of the corporation that related to the crimes<sup>382</sup>.

Unlikely, the allegation and penalty of criminal offence against the juristic person is obviously more frequent to be applied than that in Great Britain. The essential provision stipulated concerns with the crime in improper doing or not doing on duty under the law regardless deliberation of crime. It seems the public utility as a stakeholder is beyond the principle of law which supports. In 1909, the Supreme Court reached the verdict in a court case between *New York Central & Hudson River Railroad Co. v. United States* proving and giving the criminal offence against the juristic person<sup>383</sup>.

After, the case of *New York Central & Hudson River Railroad Co. v. United States* had dissolved, the rationality discussed in the trial was notable through the local courts among interstates. Traditionally, the certain degree of the criminal sentence against the juristic person was always deeply specific trial of criminal offence with no consideration of criminal deliberation as it was always in the general crimes. As the result, the former principle of no criminal offence against the juristic person is changed of the criminal offence<sup>384</sup>.

Should the criminal offence with no consideration of deliberation of crime dissolve by any juristic persons who shall be punished without deliberation-based offence and shall not be punished with deliberation-based offence? The answer of this

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<sup>382</sup> See "A Critique of Tesco Supermarkets Ltd. V. Nattrass, English Language Version, ([https://Digital.Library.Adelaide.Edu.Au/Dspace/Bitstream/2440/24792/1/Alr\\_V4n1\\_1971\\_Fiscon.Pdf](https://Digital.Library.Adelaide.Edu.Au/Dspace/Bitstream/2440/24792/1/Alr_V4n1_1971_Fiscon.Pdf) ).".

<sup>383</sup> "Beale, S.S. 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability' (2013) (<http://Scholarship.Law.Duke.Edu/>) ([http://Scholarship.Law.Duke.Edu/Cgi/Viewcontent.Cgi?Article=5910&Context=Faculty\\_Scholarship](http://Scholarship.Law.Duke.Edu/Cgi/Viewcontent.Cgi?Article=5910&Context=Faculty_Scholarship) ) Accessed 18 November 2014.."

<sup>384</sup> Diskant, B. E., "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," [The Yale Law Journal](#).

question should consider the concept of criminal offence against the juristic person<sup>385</sup>. Otherwise, expanded to cover the other criminal grounds which is required supporting evidences of criminal deliberation namely; disparagement, defamation, personal loans with exceeding interest rate. The evidence was from the court's decision on criminal sentence against the employee who worked for the corporate firm committing crime that the criminal offence shall be deserved to the juristic person effectively<sup>386</sup>. According to Lim (2013)<sup>387</sup> the extensive idea of the criminal offence against the juristic person in the Common Law -based countries has been changed from the traditional doctrine and covered to the consideration of criminal deliberation into details of criminal factors on committing crimes which the latter no evidence of the decisive judge and the general jurist are observed. The expansion of thought includes if the juristic person is capable to do crime deliberately; that is assaulting or robbing people when the controversial issues remain out there.

A legal principle derived from this case is called as "*Alter Ego*", which means that an intention of an organization is considered as that of a juristic person. Common laws also state the punishment for actions that a juristic person cannot take. The actions can be divided into two types: 1) Actions with punishments that do not include fines (Most persons who take criminal actions under English laws are fined. Hence, a juristic person may be punished for almost every criminal actions, except for murder, treason, and some forms of piracy.) and 2) Other criminal actions (e.g. bigamy, rape, incest, and

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<sup>385</sup> R.B. Thompson, "Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise," Vanderbilt Law Review, 47(1) (1994): 1-42.

<sup>386</sup> D.N. Conn, "When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors," Fordham Journal of Corporate & Financial Law, 15(1) (2009): 179-220.

<sup>387</sup> E. Lim, "A Critique of Corporate Attribution: "Directing Mind and Will" and Corporate Objectives.," Journal of Business Law, (2013): 333-353.

perjury) that a juristic person cannot take or ones that are taken by a legal representative and not related to his or her scope of work<sup>388</sup>.

In the United States, a juristic person is an artificial entity. A juristic person and its authorized person who mutually commit an offense may be sued because they have strict liability. The congress enacted the Sherman Antitrust Act of 1890 and other similar laws that were approved by the US Supreme Court in order to use the laws for punishing a juristic person who commit offenses. For instance, law defined punishments for individuals who have authorities to manage corporate entities (i.e. Respondent Superior) in different cases: 1) An individual commits an offense on behalf of a juristic person, 2) An individual commits an offense in order to provide a benefit for a juristic person, and 3) An individual commits an offense within a scope of authority of a juristic person (punishments for this offense also cover the juristic person's all legal representatives, employees, and independent contractors. The US Supreme Court also expended the punishment to successor corporations, even though the corporations become non-existent<sup>389</sup>.

Furthermore, the section 2.01(1) of the Model Penal Code<sup>390</sup> states that a juristic person may be punished if it commits a criminal offense that is a violation or other actions stated in the Act of Congress. The objective of the law is defined the punishments for juristic persons who commit offenses through their corporation agents within their scope of authority or employment. For instance, the offenses include

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<sup>388</sup> "Chapter 2: Bill of Rights' (Justice.Gov.Za N.D.)  
<[Http://Www.Justice.Gov.Za/Legislation/Constitution/Saconstitution-Web-Eng-02.Pdf](http://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf)) Accessed 11 December 2013.."

<sup>389</sup> I. Sivachenko, "Corporate Victims of Victimless Crime: How the Fcpa's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance," Boston College Law Review, 54(1) (2013): 393-432.

<sup>390</sup> Model Penal Code, Section 2.01 (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

allowance, order, request, and negligence of a duties required by laws or that of managers of the juristic persons or corporate entities under corporate objectives. However, the law stated that;

“The offense is a violation or the offense is defined by a statute other than the [Criminal] Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply...”<sup>391</sup>

Hence, the criminal punishments in this country cover all employees of any juristic persons, negligence in efficiently managing activities of the juristic persons, and allowance for mistakes by managers; except that the persons can prove that they reasonably prevent any criminal action. In addition, American laws persuade the corporate entities or the juristic persons to establish measures that prevent their legal representatives or employees to commit criminal offenses under state or federal laws such as the Federal Food, Drug, and Cosmetic Act (FFDCA). In cases, that offenses are committed by the persons, fines will be reduced if the companies facilitate legal proceedings. Then, the committees, authorized persons, employees, and other persons will receive criminal and civil punishments that are not the same punishments for the juristic persons. In cases, that the legal representatives who are authorized to prevent law violations do not prevent or fix the violations, the legal representatives and their juristic persons must be punished<sup>392</sup>.

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<sup>391</sup> L.E. Dervan, "Reevaluating Corporate Criminal Liability: The Doj's Internal Moral Culpability Standard for Corporate Criminal Liability," Stetson Law Review., 41(1) (2011): 7-20.

<sup>392</sup> A.O. Nwafor, "Corporate Criminal Responsibility: A Comparative Analysis.," Journal of African Law., 57(1) (2013): 81-107.

Generally, the judge and the jurist have hardly been in effort on considering the distinction of both an offence of the infringement and the criminal offence the court dispute between *State v. Eastern Coal Co.*, the company, the defendant testified and defend an offence of the infringement which was about the compensation while the criminal offence of penalty sentence was put against the juristic person; to be more precise, the stockholders of the corporate firm, who was usually innocent and deprived of a performance by the employee. The judge sustained the deposition and provided a dictum that the defendant “company” might be penalized<sup>393</sup>. Meanwhile, Anderson and Waggoner (2014) explained it might also be considered as an offence of the infringement caused by the employee’s manipulation. The next court trial applied the similar adjudication of the previous trial in a case “*United States v. Nearing*” which the court Learned Hand provided his rationales that “...practically, it has no difference between an offence of Civil Code and an offence of Criminal Code since the Pro and Con factors or the illegally objectives performed are all a state of mental being of the corporate agent to become the company’s.”<sup>394</sup>

In addition, in the United States, the Corporate Probation is adapted for controlling the behavior of the legal entity who performs criminal offence as well. This control is not merely the control of the legal entity’s behavior. The behavior of representative of legal entity by letting the legal entity report on controlling behavior staffs that it does not have any misconduct of behavior according to the court only defined but it is the court that provides the punishment measure by defining the conditions to let the legal entity practice as for the tool to control the criminal offences

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<sup>393</sup> Brooks, D. S., and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," Defense Counsel Journal.

<sup>394</sup> M.J. Anderson, and Waggoner, I. , "The Changing Role of Criminal Law in Controlling Corporate Behavior Rand Corporation.," (2014).

such as criminal compensation (Restitution), social action activities or order to pay compensation (a Remedial Order) or other conditions as tolerated<sup>395</sup>.

Regarding the concept of criminal liability of the juristic person in American Common Law System. It is highly developed because the juristic person has more roles in this country than the other countries. In other words, a juristic person may receive criminal punishment for its wrongful action(s) according to laws. American laws state that a juristic person may take a criminal action if the action is taken by an organization or representative of the juristic person according to the *Alter Ego* doctrine<sup>396</sup> as it is considered that the juristic person is the one that takes the action, except for actions that cannot be taken by the juristic persons.

According to, New York Central was consistent with other decisions of Supreme Court giving full effect to other critical aspects of the federal antitrust legislation adopted during this period. Historians have noted that both public opinion and federal policy seem to have reached a turning point in the years immediately preceding New York Central decision. President Roosevelt took great interest in the enforcement of the antitrust laws, and Congress appropriated the special funds for enforcement and provided for expedited appeal of antitrust cases to the Supreme Court. Although, the Supreme Court's first decision gave the Sherman Act a narrow reading that threatened its effectiveness<sup>397</sup>, then the court issued a series of decisions between 1897 and 1911 upholding lower court decisions preventing mergers and breaking up

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<sup>395</sup> L.M. Fairfax, "On the Sufficiency of Corporate Regulation as an Alternative to Corporate Criminal Liability," *Stetson Law Review*, 41(1) (2011): 117-126.

<sup>396</sup> "Hagan (2007) Stated That "the Alter Ego Doctrine Is Used to Establish the Direct Liability of a Shareholder or Owner When the Shareholder or Owner Improperly Uses the Corporate Entity to Commit Acts Which Harm the Corporation Itself, or Third Persons Involved with the Corporation." Hagan, J.J. 'The Alter-Ego Doctrine Exception in California Corporate Law' (Haganlaw.Com 2007) <[Http://Haganlaw.Com/Wp\\_Content/Uploads/2011/05/Aler\\_Ego\\_Doctrine\\_2007.Pdf](http://Haganlaw.Com/Wp_Content/Uploads/2011/05/Aler_Ego_Doctrine_2007.Pdf)> Accessed 16 January 2014.."

<sup>397</sup> P.H. Epstein, "Officer and Owner Liability for Corporate Tax," *Corporate Business Taxation Monthly*, 13(8) (2012): 15-22.

the Standard Oil and American Tobacco trusts. The opinion in *New York Central* endorsed the another critical aspect of the new legislative framework.<sup>398</sup>

Given the prominence of corporations in the interstate commerce, their immense potential to do wrong, and the absence of other regulatory mechanisms, a powerful deterrent would have been lost by restricting criminal liability to agents. Individuals and Organizations, there are a few incentives without the prospect of Vicarious liability. However, with joint and several liabilities, both the principal and its agents have a distinct risk of liability and, from this, a reciprocal incentive for law abidance.

Besides, the simple-minded public policy that emerged in [*New York Central*] seemed ideal in its shared allocation of risks to both principal and agent. Corporate liability deters crime; it moves the risk of loss away from risk averse officers and directors toward the firm; it efficiently distributes the liability risk between the firm and the employees. Without significant entity liability or even shared liability, some argued, incentives would be seen as too weak to ensure an organizational commitment to law abidance<sup>399</sup>.

### 3.2.2 The United Kingdom

A company is a legal person capable of being prosecuted for most criminal offences, unless a statute indicates otherwise. Insider dealing and the criminal cartel offence are two criminal offences for which corporate liability is expressly excluded Section 52 of the Criminal Justice Act 1993<sup>400</sup> and Section 188 of the Enterprise Act

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<sup>398</sup> C.L. Evans, "Case for More Rational Corporate Criminal Liability: Where Do We Go from Here," *Stetson Law Review*, 41(1) (2011): 21-40.

<sup>399</sup> E.S. Podgor, "Corporate Criminal Liability: Introduction," *Stetson Law Review*, 41(1): 1-6.

<sup>400</sup> The Criminal Justice Act 1993, Section 52. The offences

(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.

(2) An individual who has information as an insider is also guilty of insider dealing if—

2002<sup>401</sup>, respectively. It is generally only senior officers of a company, at or close to board level, whose acts can be identified with the company in this way, as opposed to

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- (a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or
  - (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.
- (3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.
- (4) This section has effect subject to section 53.

<sup>401</sup> The Enterprise Act 2002, Section 188 Cartel offence

(1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

- (2) The arrangements must be ones which, if operating as the parties to the agreement intend, would—
- (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
  - (b) limit or prevent supply by A in the United Kingdom of a product or service,
  - (c) limit or prevent production by A in the United Kingdom of a product,
  - (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,
  - (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or
  - (f) be bid-rigging arrangements.

(3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would—

- (a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,
- (b) limit or prevent supply by B in the United Kingdom of a product or service, or
- (c) limit or prevent production by B in the United Kingdom of a product.

(4) In subsections (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 189).

(5) “Bid-rigging arrangements” are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom—

- (a) A but not B may make a bid, or
- (b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

(6) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

those acting merely as the company's agent or servant. For example, in *Tesco Supermarkets Ltd. v. Natrass*, which remains the leading authority on the identification principle. Tesco supermarket was prosecuted under the Trade Descriptions Act 1968 for displaying a notice indicating that goods were being offered at a price less than that they were actually being offered. This occurred because the manager of their branches had negligently failed to notice that he had run out of the low-price packets. The House of Lords considered that the branch manager could not be held to embody the company as a whole, which made available to Tesco a due diligence defence under Section 24 of the Trade Descriptions Act 1968<sup>402</sup>.

Corporate Criminal Liability may also arise where the board of directors has delegated part of its management functions and the delegate has 'full discretion to act independently of instructions from them' (*Tesco Supermarkets Ltd. v. Natrass*). Applying this delegation principle to *Tesco Supermarkets Ltd. v. Natrass*, the branch manager could not be identified with the company because the board was not found to have delegated any of its functions. While, the directors had set up a chain of command through regional and district supervisors, they remained in control and the shop

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(7) "Undertaking" has the same meaning as in Part 1 of the 1998 Act.

<sup>402</sup> Trade Descriptions Act 1968, Section 24 Defence of mistake, accident, etc.

(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(2) If in any case the defence provided by the last foregoing subsection involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

(3) In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

managers had to follow orders. Therefore, the acts or omissions of shop managers could not be imputed to the company itself<sup>403</sup>.

The criminal offence against the juristic person where it began in the Great Britain was such a minor crime which is evident as non “*Mens rea*”. Thus, the accusation and penalty was not a relevance of criminal deliberation to prevent it from traditional concept of criminal sentence against the juristic person. The idea included when the juristic person was obliged by the legislative act but instead was refrained from following its. Hence, it was not justified to randomly put a charge against any individual persons. The sample case *Regina v. Birmingham and Gloucester Railway Co.*; the juristic person was allowed to perform by law but choose to evade, the judge ruled a penalty against the defendant as a performer on behalf of it, who ignored to remove the constructed bridge overhead across the local road and the similar case considered on *Regina v. Great North of England Railway Co.* by the court order on the obstruction of the rail track which is against the construction of the main road. The dissimilar ideas which remained the concept of criminal offence with deliberation committed by the juristic person was practically in vain<sup>404</sup>. The good sample was *Commonwealth v. Proprietors of New Bedford Bridge* case, of which Judge Bigelow gave his dictum, “The juristic person is not deserved to be punished by criminal offence which requires deliberation of the doers who abuses by his violation as a social crime because it is not in a position to perform rebellion or severe crime, perjury or physical assault. All except, the fore mentioned are possibly to be put a charge against the criminal offence performed by its corporate representative under the authorization given by the particular corporate person. Should we sustain the traditional practice? It would be hard to dissolve the court case when the decisive case resulting from the executed crime would also be considered as the force majeure. To be clarified, the decisive trial would be provided to

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<sup>403</sup> *Ibid.*

<sup>404</sup> K.A. Oluwakemi, "The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom," *Islamic University Malaysia Law Journal*., 22(1) (2014): 115-136.

the corporate agent as a performer instead of the juristic person who is master-minded. The legal-based concept on this is not supportive to provide mercy on the criminal offence achieved by the juristic person.”<sup>405</sup>

The ideally concept of the criminal penalty has covered with a none – consideration on deliberation of crime against the juristic person who performs preceding a notification of Interpretation Act, 1889; Section 2<sup>406</sup> which mandates the use of the criminal offence to include the term applied in “individual Person” with “juristic person” and with subject to change or intend to interpret in other way<sup>407</sup>.

In England, there were two types of offence; legal offence under Common Law and offence under Statutory Offence. The problem occurred whether the legal entity would be liable for both criminal offences or not. Originally, England had the opinion that the legal entity might not be liable to the criminal offence due to considering that the legal entity did not exist in body and bio-spirit as the ordinary person. It could not appear before the court for the consideration of the case. Some might see that the legal entity was not existed in body by investigating in the criminal case. Some suggested that the legal entity might not be liable to the serious offence such as the death penalty<sup>408</sup>. In addition, Baer (2010) explains it also suggested that the legal entity was only the ordinary person which the law identified. Thus, the offences could be

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<sup>405</sup> Anderson, M. J., and Waggoner, I. , "The Changing Role of Criminal Law in Controlling Corporate Behavior Rand Corporation.."

<sup>406</sup> Interpretation Act, 1889; Section 2

(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this act, the expression “person” shall, unless the contrary intention appears, include a body corporate.

(2) Where under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

<sup>407</sup> N.C. Nana, "Revisiting the Question of Imputation in Corporate Criminal Law Cambridge Scholars.," (2010).

<sup>408</sup> Oded, S., "Inducing Corporate Compliance: A Compound Corporate Liability Regime," International Review of Law and Economics.

performed within the framework of the authority as the law identified only. The legal entity was unable to act in criminal offence due to the criminal offence was the matter in exemption from the scope of the legal entity action<sup>409</sup>.

Responding the rapid growth of socio-economy, this lets the legal entity played much role in various occupations. The legal entity is important and affects the well-being of society in the present day very much. This issue does not support the legal entity be liable to criminal offence, it may cause the damages and affects the society overall. Thus, the jurist of England has begun to accept the legal entity being liable to criminal offence. Initially, the criminal offence of the legal entity has developed from the judgment of court. The court ruled that the legal entity was liable to criminal offence. However, it was only in the fault that the legal entity was liable to offence such as the Nonfeasance, etc.<sup>410</sup>

In addition, the court will start the development of principle of criminal offence in the beginning, the legislation itself has also took part in the development of principle of responsibility of criminal offence of the legal entity. It can be considered from the Interpretation Act, 1889 for applying with the Statutory Offence. Such Act was the legislation on the interpretation of the Act that having criminal penalties which in Section 2 of The Interpretation Act, 1889<sup>411</sup> legislated that "Under interpreting the Act which provides the criminal penalty whether such Act will be released before or after this Act, the term "individual" in the Acts shall include the legal entity as well, unless it will be seen from the intention of such Act that desires to be the others" which the Act was deemed as being the solution of criminal offence of the legal entity for other offences efficiently at some degrees. However, for the offence of the legal entity under

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<sup>409</sup> M.H. Baer, "Organizational Liability and the Tension between Corporate and Criminal Law," Journal of Law and Policy, 19(1) (2010): 1-14.

<sup>410</sup> Khanna, V. S., "Corporate Criminal Liability: What Purpose Does It Serve?," Harvard Law Review.

<sup>411</sup> See Footnote No. 396

the Common Law had originally argument on the issue of the legal entity status that it did not exist<sup>412</sup>.

Thus, the legal entity has no life and spirit as well as the ordinary person, this could not be criminally acted and intended. The legal entity might not be liable to criminal offence identified by the law. Moreover, according to the guideline of court judgment, it has never appeared that the court used to put the general principle to let the legal entity be liable to the offence under the Common Law. This caused the issue whether the legal entity would be liable to its personal action (Personal liability<sup>413</sup>) or not due to by the legal entity status, it did not have its own *Mens rea*. Thus, it would be considered the action or intent of any individuals as the criminal action or intent of the legal entity as the impropersness<sup>414</sup>. In addition, the court in England also has brought the principle of *Alter Ego* for application. This referred to any action and intent of the employee was the action and intent of the legal entity itself. Responding such case, Nicholas (2014)<sup>415</sup> provided the two collections of criteria for consideration of action and intent of the legal entity in England as follows:

- (1) Such offence and intent must belong to the legal entity that controlled the policy of that legal entity, generally, it referred to the Director or General Manager.

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<sup>412</sup> Nana, N. C., "Revisiting the Question of Imputation in Corporate Criminal Law Cambridge Scholars.."

<sup>413</sup> liability may refer to offence.

<sup>414</sup> J.N. Djilani, "British Importation of American Corporate Compliance," Brooklyn Law Review,, 76(1) (2010): 303-342.

<sup>415</sup> J. Nicholas, "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the Uk and Germany.," Criminology & Criminal Justice: An International Journal,, 14(1) (2014): 100-120.

- (2) Such offence should be the work on duty (Course of employment) of the person no the personal business, that is, it must be separated of the action as the company business (Corporate business), and the private business apart from each other. The term “work on duty” in this meaning narrower than referred to the definition of the same term in the Civil Law, but “work on duty” was unnecessary to be the action by the intent beneficial to the legal entity, always<sup>416</sup>.

As mentioned above, Dobson (2013)<sup>417</sup> explains it could be seen in England the legal entity was able to get the criminal offence both Statutory Offence Law and Common Law, but there were some offences which the legal entity might not be liable to the guilty as follows;

- (1) The offence having the other punishment which was not the fine, it was unable to penalize the legal entity because the legal entity status did not open to any other punishment except the fine. But, the offence under English Law at present, most of them are the fine punishment which let the legal entity may be liable to criminal offence in almost all bases of offences except the offence of killing others, guilty of treason, and found guilty of pirate in certain base of offence, etc.
- (2) The offences which by the legal entity status may not be the offender or the offence that the representative of legal entity has done but it is not involving the scope of the work employed, such as offences of bigamy and rape, guilty of sexual intercourse with close relatives, guilty of perjury, and guilty of conspiracy, etc.<sup>418</sup>

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<sup>416</sup> *Ibid.*

<sup>417</sup> 385-395A. Dobson, "Directors Liability for Death or Workplace Injury," International Journal of Law & Management, 55(5) (2013).

<sup>418</sup> *Ibid.*

Thus, it was summarized that England was the country in the Common Law System which focused on the importance of the judgment in basis. Especially, the legal offence under the Common Law which the English Court has placed the principles in order to let the legal entity was able to be liable to criminal offence. The court would consider the action and the intent of organization (Organ) of the legal entity as the criminal action and intent of the legal entity. Later on, such principle was developed to be the *Alter Ego Doctrine* for the offence under Statutory Offence Law. The legislature has legislated the Interpretation Act, 1889<sup>419</sup> by legislating the interpretation of the term “person” in the provision of law should include the legal entity as well. It was evident that the legislature of England has played role to help and solve many problems of criminal offence of the legal entity by letting the legislation of law be clearer in a matter of defining the criminal offence of the legal entity.

In order to consider the Corporate Manslaughter and Corporate Homicide Act (CMA) for solving the offence. The defects of management (Management failure) by considering from the method of the legal entity’s management is opened the opportunity for the court to consider overall rather than it will be looking at the body of the representative of legal entity<sup>420</sup>. The identified penalties include;<sup>421</sup>

- (1) Fine - Fine for the legal entity in performing the offence under the principle of Corporate Manslaughter. The law does not define the maximum rate. Thus, the court is able to consider fine without any limit which depends on the discretion of the court.

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<sup>419</sup> See "The Interpretation Act, 1889,  
<[http://www.legislation.gov.uk/ukpga/1889/63/pdfs/ukpga\\_18890063\\_en.pdf](http://www.legislation.gov.uk/ukpga/1889/63/pdfs/ukpga_18890063_en.pdf)>."

<sup>420</sup> E.C. Emen, and Uche, P.A. , "A New Dawn of Corporate Criminal Liability Law in the United Kingdom: Lessons for Nigeria," *African Journal of Law and Criminology*, 2(1) (2012): 86-98.

<sup>421</sup> Djilani, J. N., "British Importation of American Corporate Compliance," *Brooklyn Law Review*.

- (2) Ordering the remedy (remedial orders) - In this case, when the court ruled that the legal entity performs guilty, the court has an authority to order the offender organization healing the damage that occurs within the time specified, and
- (3) Publicity order - The court is able to specify the legal entity organization as the offender advertise or publish the fact of the guilty including other details under the law to the public such as the amount of the fines or damages or ordering content of compensations, etc.<sup>422</sup>

However, this research study reviews Corporate Criminal Liability in Common Law System. The study focuses on the United States because this country has similar concepts to England, which is a country that also uses Common Law<sup>423</sup>. Different topics that are reviewed include concepts and developments of policies about criminal punishment as well as forms and methods of punishments. Especially, in Common Law System, a juristic person can be punished, if there is a relevant provision or specific law that offense(s) and penalty(ies) for the juristic person<sup>424</sup>.

In terms of vicarious liability under Common Law-based states can be explained that, the concept of vicarious liability has been compromised on the way that they apply for it. In the United Kingdom, there is the specific law indicated the nature of the corporation false in terms of criminal. Stated that '[A]s an employer is responsible for selecting, training and supervising the employee, not to mention placing the employee in a position where the offence can be committed. Should the employer also be responsible for the employee's crime or not? The case for liability becomes even more

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<sup>422</sup> Mays, H. R., "Corporation's Liability for Criminal Acts."

<sup>423</sup> Emen, E. C., and Uche, P.A. , "A New Dawn of Corporate Criminal Liability Law in the United Kingdom: Lessons for Nigeria," African Journal of Law and Criminology.

<sup>424</sup> M. Findlay, "Enunciating Genocide: Crime, Rights and the Impact of Judicial Intervention.," International Criminal Law Review, 13(1) (2013): 297-317.

compelling when the employee has acted to benefit for the company and the company has retained the profits generated by the wrongdoing.<sup>425</sup>

Besides, Edwards explained that “So long as modern legislation continues to intrude itself into every sphere of trading, business, health and social welfare activities, laying down elaborate codes of conduct to be observed by responsible officials, the doctrine of vicarious liability will continue to be an evil necessity. But, each gesture on the part of the judiciary and the legislature which refuses to extend the obnoxious principle is to be applauded.”<sup>426</sup> The judiciary in this country appears to apply the concept widely. Several State Courts in the US presently considers the criminal offence against the juristic person whose employee or the corporate representative commits criminal crime<sup>427</sup>. Douglas (2007) supported the US Court turns to apply the concept of vicarious liability instead of the primary liability or *Alter Ego* because the actor must be the corporate representative of the juristic person. It is hard to decide who is a real actor; the corporate representative or the down level. Therefore, the concept of *Alter Ego* may pave way to let loose the juristic person as simple as it gets if the corporate representative is not an actor but ignore what the subordinate does for him or her. The vicarious liability is more compromising to be applied punishment against the juristic person<sup>428</sup>.

Interestingly, the US Court does not provide a degree of criminal offence under the law by corporate authorization when the provision of economic law is applied directly. In other word, the court also does not consider if the company has got the policy

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<sup>425</sup> A. Barron, "Impact of Post-Lister Vicarious Liability on the Licensed Trade in the United Kingdom," Entertainment and Sports Law Journal, 4(3) (2007): 1-13.

<sup>426</sup> Edwards T., "Criminal Failure and the Chilling Effect: A Short History of the Bhopal Criminal Prosecutions Social Justice, ," 41(2): 243.

<sup>427</sup> P. Morgan, "Distorting Vicarious Liability," Modern Law Review, 74(6) (2011): 932-946.

<sup>428</sup> B. Douglas, "Enterprise Liability: Justifying Vicarious Liability," Oxford Journal of Legal Studies, , 27(3) (2007): 493-508.

plan or even the assignment appointed by the company has been given by authorization. Only, if any employee of the company violates the law by the use of authorization, the court can put a degree of punishment against the violator. A good sample of the court case like *Egan v. United States*<sup>429</sup> as well as *Holland Furman Co. v. United States* has proven the assumption above. In general, most state courts provide adjudication on the criminal offence against the juristic person when the corporate agent or representative performs in-scope of any corporate agents for the benefits<sup>430</sup>.

The rationale for the adjudication in the US Court had influenced on the jurists across the country. The Model Penal Code, Section 2.07<sup>431</sup> mirrored the concept pretty

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<sup>429</sup> S.R. Gruner, "Corporate Criminal Liability and Prevention," Law Journal Press, (2004): 47-53.

<sup>430</sup> Brickey, F. K., "Corporate Criminal Accountability: A Brief History and an Observation," Washington University Law Review, .

<sup>431</sup> The Model Penal Code, Section 2.07 liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf.

- (1) A corporation may be convicted of the commission of an offense if:
  - (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
  - (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
  - (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.
- (2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.
- (3) An unincorporated association may be convicted of the commission of an offense if:
  - (a) the offense is defined by a statute other than the Code which expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or
  - (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.
- (4) As used in this Section:
  - (a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

clearly. The law provided the performance or the intention of the executives are related to the juristic person as well. Evidentially, the juristic person should be responsible for the performance its executives had committed to any offensive grounds.

The adaptive U.S. Model Penal Code provided not only the juristic person who should be put the criminal offence caused by the executives whose position was the CEO of the juristic person but also provided in Article 2.07 (1)(a) on the criminal offence against the corporate agent who acts on behalf of the corporation within in-scope of authorization. The company shall be put punishment from the performance of the corporate agent. "Agent" defines more extensively to the committee, the executives, employees or any individual persons who is authorized to do something on behalf of the company. The employees who work for the company but holds no position and perform something without authorization are in-scope of his or her routine work.

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(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6)(a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

Thus, the juristic person shall not be deprived of responsibility on any criminal crime caused by the members. The concept may be considered as opposition to the criminal law and possible to indicate the purpose or the principle of the criminal law in general. Since, all responsibilities are related to the wrongful act caused by the juristic person or the employees<sup>432</sup>. Being considered if the juristic person is to secretly observe the corporate agent or the employee performs during times, it is waste times for this randomly surveillance. The primary liability may be simply drafted and carried out the trial because the trial process has no difficulty during the session in order to investigate the criminal offence against the juristic person<sup>433</sup>.

Besides, the concept of the primary liability is based on the *Alter Ego*. In the principle of the Common Law, the Organ theory is commonly known as the Theory of *Alter Ego* of which can be seen in the court case-*Lennard's Carrying Co., Ltd v. Asiatic Petroleum Co., Ltd*. When the House of Lords reviewed on the idea that the juristic person is criminal offence and those wrongful act was charged, it requires investigation of how different of the performance taken by the juristic person, and the corporate representative done the wrongful act according to the purpose and deliberation of the corporate firm are acquired from the person who is the corporate representative.

In fact, they are considered as the deliberation and even existing being of the juristic person<sup>434</sup>. Regarding adjudication of the court, the performance of person who was the managing director of the defendant “company” was the offender and shall be given the penalty. It is indicated that, if the juristic person is charged under the criminal offence as a performance of the juristic person, the “performance” shall be a person

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<sup>432</sup> R. Mays, "Towards Corporate Fault as the Basis of Criminal Liability of Corporations," *Mountbatten Journal of Legal Studies*, 2(2) (1998): 31-67.

<sup>433</sup> C. Wells, "Corporate Criminal Liability in England and Wales: Past, Present, and Future," *Comparative Perspectives on Law and Justice*, 9 (2011): 91-112.

<sup>434</sup> Analyzed by using case *Lennard's Carrying Co., Ltd v. Asiatic Petroleum Co., Ltd*. See Footnote No. 359.

who is responsible for the juristic person is different from action or no action of the subordinate. Therefore, the performance of the juristic person shall be an action of a person as if only the juristic person<sup>435</sup>.

In the next court case *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., (Great Britain) Ltd.*<sup>436</sup>, the court added the performance is not only a person as the juristic person but authorization of a person is also concerns. Hence, it is considered as the performance of the sole juristic person. The British Court followed the concept of the performance of the authorized person who is responsible to run the company; the managing director, by law is the corporate representative and demonstrates the intention and performance of the company<sup>437</sup>.

The contradictory case which appeared to be complex in aforementioned concept was *Moore v. I. Bresler Ltd.*<sup>438</sup> when the adjudication by the court felled into the criminal offence relate to the branch manager that associated with the sale manager who was not the corporate representative. It was notable case of contradiction for some reviews of the concept<sup>439</sup>. Welsh (1946) reviewed that the court's judgment had caused to confusing term between the corporate representative and the vague definition of the juristic person. The confusion included the use of vicarious liability (*Alter Ego*) for the

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<sup>435</sup> Nicholas, J., "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany.," Criminology & Criminal Justice: An International Journal.

<sup>436</sup> "Daimler Co., Ltd. V. Continental Tyre and Rubber Co. (Great Britain) Ltd. (1916) 2 AC 307 Is a UK Company Law Case, Concerning the Concept of "Control" and Enemy Character of a Company. It Is Usually Discussed in the Context of Lifting the Corporate Veil, However It Is Merely an Example of Where the Corporate Veil Is Not in Issue as a Matter of Company Law, since the Decision Turns on Correct Interpretation of a Statute.."

<sup>437</sup> Cavanagh, N., "Corporate Criminal Liability: An Assessment of the Models of Fault.," Journal of Criminal Law.

<sup>438</sup> "Moore V. I. Bresler Ltd., the Secretary of the Accused Company, Who Was Also the General Manager of the Company's Nottingham Branch, Acting Together with the Sales Manager of That Branch, Sold, with the Object of Defrauding the Company, Certain of the Company's Goods.."

<sup>439</sup> Yarosky, H., "The Criminal Liability of Corporations' (N.D.) " McGill Law Journal.

concept considered in the Court's suggestion related to the exclude the vicarious liability since it was the concept of the Civil Law<sup>440</sup>.

From the adjudication of the British Court, it is assumed that the concept of *Alter Ego* is fundamental idea of considering the person representing and executing on behalf of the corporation, namely, the corporate company. Hence, the corporate committees usually are independent to draw the policy plan. Due to their independence in policy plan, the performance or deliberation of the committees are not considered as the corporate representative but the corporate firm<sup>441</sup>. The concept was similarly applied in the adjudication of the France Court. Even though, the court did not explain with the *Alter Ego-based* in particular but the performance of the person who was the corporate representative committed crime and considered as if it was the performance of the juristic person in the criminal ground<sup>442</sup>.

Being considered on the original and fundamental idea of the vicarious liability and the primary liability, the distinction is observed. The reviews of what concept enabling us to consider the criminal offence of the juristic person is concerned. Prior to the criminal ground committed by the juristic person, it is required the performance or exemption of the juristic person will depend on the wrongful act of the individual person<sup>443</sup>. Fundamentally, Harlow (2011) said it may not be logical in the consideration of all involved persons related to the performance of the juristic person. In generally, it is considered as the performance of the juristic person that the performance should be

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<sup>440</sup> R.M. Greenberg, "If You Conduct Business on a Transnational Scale, Don't Leave Home without an Anti-Bribery Compliance Program," The California International Law Journal, 22(1) (2014): 29-31.

<sup>441</sup> M. Narines, "Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability," Catholic University Law Review, 62(1) (2012): 41-90.

<sup>442</sup> Evans, C. L., "Case for More Rational Corporate Criminal Liability: Where Do We Go from Here," Stetson Law Review.

<sup>443</sup> *Ibid.*

a person who is responsible to operate the corporate firm. Practically, it is difficult to consider as which intent or performance of the juristic person<sup>444</sup>.

The discussion was brought by Judge Denning L.J. who adjudged the court case of *HL Bolton (Engineering) Co., Ltd. v. TJ Graham and Sons Ltd.* that “A company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and acts in accordance with directions from the center. Some of the people in the company are mere servant and agents who are nothing more than hands to do the work and cannot be said to represent the managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers are the state of mind of the company.”<sup>445</sup>

However, what was Denning L.J. provided about the performance of a person who is considered as it acted by the company should look into a status of persons related to the company; Should a person compare to the human body is like the brain or nerve center? It can say that, the performance of that person should be considered as a company as the juristic person. Even, the adjudication of Denning L.J. in the Bolton’s case was simple to understand, the UK Court was hard to follow completely. There were many criminal offences against the juristic person who response managing director, the general manager, the sale manager, the branch manager and the secretary acted. The human body in comparison with the case was not matched since the management of the corporate representative which generally should relate to the subordinate acted or the act that is dissimilar to an amazing brain in monitoring the body’s parts.

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<sup>444</sup> J.W. Harlow, "Corporate Criminal Liability for Homicide: A Statutory Framework," Duke Law Journal, 61(1) (2011): 123-166.

<sup>445</sup> S.M. Tariq, "An International Answer to Capturing Corporate Criminality," Jurisprudence, 21(2) (2014): 355-372.

### 3.3 Corporate Criminal Liability in the Civil Law System

In an aspect of theoretical law, the concept is similar to Civil Law's Jurisdiction System regarding the juristic person as the fictitious person which is established by the legislative act. It holds right and duty in compliance with laws and not limited to objectives of the written instrument of established the juristic person describing that the deliberation of the juristic person expresses by mean of the corporate person. It can say that, the committee in any established companies.

According to corporate criminal in Civil Law, it is legal to contain a merely one person; a few company is not in practice to do this. The author debates to a point that the committee is authorized by law. Hence, it is considered as the corporate representative, not as an agent applied by the Civil Code<sup>446</sup>. The general business representative is not authorized to perform purchases or realty mortgage; exceeding 3 years of rental property, mediation and prosecution in court while the corporate company is legalized to perform relatively business except it is constrained by corporate authorization. The idea is the committee appointed by the company's shareholders holds the same actions if the performance achieved by the company related to the Civil Code which it is not either personal responsibilities or personal benefits. It is fundamental idea that the corporate firm is exclusively an implementing tool which is operated with business capital and expertise for limited responsive actions or risks and established by a legalized group for a particular purpose of any commercial businesses. Having a term considered, the "performance" achieved by the corporate firm support for term use since the firm which runs by corporate person is not capable to perform successfully by itself to begin with<sup>447</sup>.

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<sup>446</sup> J. May, "Corporate Criminal Liability and the Threat to Civil Liberty," *Stetson Law Review*, 41(1) (2011): 63-72.

<sup>447</sup> G.S. Moohr, "Balance among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement," *American Criminal Law Review*, 46(4) (2009): 1459-1480.

In terms of vicarious liability, the concept of vicarious liability has been disputable since most jurists review it as the theory of Civil Law which indicated the person who is responsible to the other person's actions may involve with the cost of compensation; the juristic person as an employer is supported for the cost caused by the employee<sup>448</sup>. The Civil Law; a delegated ministerial regulations applied in the Common Law-based and an offence of the infringement. The provision of Article 121-3 under French Criminal Code<sup>449</sup> on the juristic person who did not act conflict as the law provision on whoever who is charged against the civil offence of the infringement caused by the other person. It should not be applied to that person who should be responsible for compensation of the other person who is against the offence of the infringement. It is concluded that the concept is not properly applied to the criminal offence which does not provide to whoever who is charged with the criminal offence for the performance of the other person. In addition, the concept is opposed to the principle of the Criminal Law which provides that whoever shall be charged with the criminal offence only if the law provides only criminal grounds of actions<sup>450</sup>.

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<sup>448</sup> M.A. Healy, "Exxon Shipping Co. V. Baker: The Supreme Court's Indecision Leaves Shipowners Lost at Sea as to the Applicability of Vicarious Liability for Punitive Damages," Tulane Law Review, 83(5) (2009): 1521-1536.

<sup>449</sup> French Criminal Code, Article 121-3  
(Act no. 1996-393 of 13 May 1996 Article 1 Official Journal of 14 May 1996; Act no. 2000-647 of 10 July article 1 Official Journal of 11 July 2000)

There is no felony or misdemeanour in the absence of an intent to commit it.

However, the deliberate endangering of others is a misdemeanour where the law so provides.

A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.

There is no petty offence in the event of force majeure.

<sup>450</sup> May, J., "Corporate Criminal Liability and the Threat to Civil Liberty," Stetson Law Review.

Corporate Criminal Liability under Civil Laws are different from that under Criminal Laws. To punish a juristic person, it requires a specific law as can be considered from the principles of Corporate Criminal Liability of the following countries.

### 3.3.1 France

Originally, French jurists considered that a juristic person could not receive a criminal punishment by referring many reasons; for instance, a juristic person could not take a criminal action. Criminal punishments were only for natural persons because death penalty and imprisonment were not possible for a juristic person. In 1982, the Counsel Constitutional clarified this issue by describing that the French Constitution allowed a juristic person to be punished<sup>451</sup>. The French Criminal Code was amended in 1991. Thus, the general principle that personnel morals (i.e. non-human entities) could not receive criminal punishments were invalidated. In 1992, criminal punishments were clearly stated in the French Criminal Code (1992). Its Articles 121-2<sup>452</sup> stated that juristic persons, except the government, are responsible for criminal actions. A juristic person must take responsibilities according to relevant laws or regulations. If an offense was committed by an organization or legal representative in order to provide a benefit for the juristic person, then the juristic person would be punished under the Articles 121-4 to 121-7.<sup>453</sup>

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<sup>451</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review.

<sup>452</sup> Nouel (2008) explained: Under article 121-2 of the Penal Code: companies may be held liable through imputation for acts caused by a natural person, so long as the natural person is acting as its organ or representative. A company may be prosecuted for most of the same offences as an individual offender." Gide Loyrette Nouel, 'Criminal Liability of Companies' (2008) Lex Mundi 1.

<sup>453</sup> Related to France Criminal Code

Article 121-4. The perpetrator of an offence is the person who:

- (1) commits the criminally prohibited act;
- (2) attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour.

Article 121-5 An attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator's will.

Unlike the Common Law-based countries, the Civil-Law based countries hold concept of criminal offence differently. However, France has clung to theoretical law, “No juristic person does crimes” for long. The French jurist reviewed that the juristic person was incapable to act as “*Mens rea*” which was not fitted to Penal Code on deliberation of crime. The execution of crime was determined by the French solicitor as no deliberation since the actor had to be conscious to deliberately commit crime while the juristic person had got nothing including no deliberation. In addition, the penalty was constrained to apply to the juristic person directly. If it was necessary, the penalty should be taken but shall not over its scheme, suppression, intimidation for example<sup>454</sup>. On the contrary, once the juristic person was brought to justice for its criminal offence. In particular case, especially the peaceful or economic harassment while the French jurist had strong comments on having the more specific law to support the criminal measure<sup>455</sup>.

According to the Public Prosecutor, working with police agencies (including those with special expertise), investigates criminal activity arising under the Criminal Code and other Criminal Laws. On completion of an investigation, a matter deemed to be supported by evidence will be referred to trial, generally before the High Court (*Tribunal de Grande Instance*) for a trial without a jury. In unusually complex or large cases, the Public Prosecutor may refer the matter to an Investigating Magistrate who conducts an investigation and decides whether to refer the matter to trial. Under some circumstances, many victims can apply to an investigating magistrate for a criminal

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Article 121-6 The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator.

Article 121-7 The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission.

Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.

<sup>454</sup> Morgan, P., "Distorting Vicarious Liability," Modern Law Review, .

<sup>455</sup> H. B Baez, "Volunteers, Victims, and Vicarious Liability: Why Tort Law Should Recognize Altruism," University of Louisville Law Review, 48(2) (2009): 221-264.

investigation, and may participate in it (and in a trial) as “Civil parties” (*parties civiles*). Under certain circumstances, a non-governmental organization with a pre-existing demonstrable interest in the subject matter may also be considered a civil party to a criminal investigation. The procedures governing such investigations and trials are found in the French Code of Criminal Procedure (*Code de Procédure Pénale*).<sup>456</sup> Although, French law does not provide a specific requirement that either a corporation or its officers must report criminal activity of which they have knowledge, auditors face criminal penalties if they fail to report such information. Any French public servant must report a first or second level infraction (a crime or a *délit*) to the Public Prosecutor’s office<sup>457</sup>.

Regarding the relationship between the juristic person and the corporate representative, it is suggested by generalising the concept of limited company establishment and its committee. When firstly, the based-limited company is a typical firm established and performed by the juristic person, the most solicitors are familiar to secondly, in general usually originate from the most of limited company. In compliance with the French Criminal Code; Article 121-2<sup>458</sup> to 121-7<sup>459</sup>, the corporate committee selected by the company’s shareholders, whose performance is authorized by the company registration and under the policy made by the exclusive shareholders in the general meeting of the shareholders are considered as the corporate representative. On the other hand, the committee is not only the employee who employed by the personnel office but the committee who acts as the corporate representative. However, it is

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<sup>456</sup> A. Atner, "How Strict Is Vicarious Liability - Reassessing the Enterprise Risk Theory" (2006) University of Toronto " Faculty of Law Review., 64(2) (2006): 63-104.

<sup>457</sup> T. Livshiz, "Choosing between Saw and Scalpel: Fcpa Reform and the Compliance Defense," Columbia Journal of Law & Social Problems., 47(4) (2014): 417-452.

<sup>458</sup> See Footnote No. 442.

<sup>459</sup> See Footnote No. 443.

disputable that under the condition of the corporate representative, this should be considered the relationship between the company and external parties by law.

Technically, Article 121-4 states when considering the relationship between the committee and the company including the others. It is suggested applying to the delegated registration on the corporate representative. It is opposed that, the principle may create confusion in term of terminology defining “representative” and “agent” differently as the use of either term is not possibly applied to this context<sup>460</sup>. It can consider if the committee simultaneously acts as the corporate representative and the agent under the French law and as the corporate representative in a form of the juristic person, the committee is authorized to act accordingly through deliberation or objectives of the company. In consequence, the company usually is responsible for the performance achieved by the firm committee who is a real actor but not include the responsibility of an individual actor except the achieving performance exceeds the boundary of its authorization under the ratification or the provided objectives. In the case that the committee performs in any disadvantages against the loss of others, the corporation is inevitably responsible for it in responding to the loss caused by the committee as an actor under Article 121-2 to 121-7.<sup>461</sup>

According to Esakov (2010), it is noted that the corporate agent used in term of the relationship between the committee and the company including the other parties indicating the committee is not the corporate agent defined as agent in general way. Logically, if the committee is considered as the corporate agent under the French Criminal Code, the committee is not legalised to perform accordingly but only if it is authorized by the company’s policy. In particular, when it is required for the company to plead claims on actions in the court trial with no other appointments made by the shareholders or any executive members. The performer who acts as the corporate agent

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<sup>460</sup> *Ibid.*

<sup>461</sup> A.H. Lipman, "Corporate Criminal Liability," American Criminal Law Review, 46(2) (2009): 359-390.

is determined by Article 121-2, but not include Article 121-4. It is assumed that the committee is effectively as the corporate agent in the text but not the actual corporate agent under French Criminal Code on applied corporate agent toward the relationship between the committee and the company including other parties. So, the French Criminal Code in terms of Corporate Criminal Liability is a concept-based for applying to all classification of the juristic person and the corporate representative.<sup>462</sup>

### 3.3.2 Japan

General Criminal Liability of Corporation does not exist under Japanese Law. This situation arose from the historical origins of the Modern Japanese Legal System, which was originally based on the French and German Civil Law Systems and the notion that only natural person can commit crimes. As a result, the Penal Code of Japan in 1907 contained no provisions for Corporate Criminal Liability. It can say that Japan has the same idea as the French jurist in that “No juristic person does crimes” The criminal offence against the juristic person requires to indicate some deeply specific laws to support the criminal measure. The offence involves most of financial or economic harassment<sup>463</sup>. The theory has used in Japan currently in term of Corporation Criminal Liability Judgement is the identification theory explained by Pieth, Low, and Cullen (2006) that; “Ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority”.<sup>464</sup>

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<sup>462</sup> G.A Esakov, "Corporate Criminal Liability: A Comparative Review," City University of Hong Kong Law Review, 2(1) (2010): 173-192.

<sup>463</sup> S.S. Beale, "Is Corporate Criminal Liability Unique," American Criminal Law Review, 44(4) (2007): 1503-1536.

<sup>464</sup> M. Pieth, Low, A.L., and Cullen, J.P. , "A Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997," OECD Commentary, 2(28) (2006): 9.

In 1932, However, the Act Preventing Escape of Capital to Foreign Countries were passed. The Act introduced the 'Ryobatsu-Kitei' into Japanese Law. Ryobatsu-Kitei has subsequently appear in various Japanese Laws. Ryobatsu-Kitei is frequently translated as 'double punishment', although Kyoto indicates that '[t]wo-sided or bilateral punishment' is a better translation.<sup>465</sup> The Corporate Criminal Liability in Japan should be consider the Penal Code of Japan Article 18 which related to the Corporate liability Judgement as; 'Article 18'<sup>466</sup>, Council of Europe Convention – Corporate liability.

Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this convention, committed for their benefits by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

– A power of representation of the legal person; or

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<sup>465</sup> Robinson, A. A., "Corporate Culture as a Basic for the Criminal Liability of Corporations ".

<sup>466</sup> Japan Penal Code, Article 18 (Detention in a Workhouse In lieu of Payment of Fines)

(1) A person who defaults in payment of a fine in full shall be detained in a workhouse for a term of not less than one day but not more than two years.

(2) A person who defaults in payment of a petty fine in full shall be detained in a workhouse for a term of not less than one day but not more than 30 days.

(3) When fines are imposed cumulatively or when a fine and a petty fine are imposed cumulatively, the term of detention may not exceed three years. When petty fines are imposed cumulatively, the term of detention may not exceed 60 days.

(4) When rendering a sentence of a fine or petty fine the court shall simultaneously determine and render a term of detention in a workhouse in the case of default of the full payment thereof.

(5) Except with the consent of the sentenced person, confinement for default of a fine may not be executed within 30 days from the time when the decision has become final and binding, and confinement for default of a petty fine may not be executed within 10 days from the time when the decision has become final and binding.

(6) When a person sentenced to a fine or petty fine has made payment of part of the fine, the term of confinement shall be calculated by dividing the amount of the unpaid payment by the amount for one day (a remainder less than one day is deemed as one whole day) reduced by a period of days in proportion to the amount of payment made for the fine or petty fine imposed.

- An authority to take decisions on behalf of the legal person; or
- An authority to exercise control within the legal person;

As well as for involvement of such a natural person as accessory or instigator in the above mentioned offences.

This can say that, Japan accommodates the great size and global conglomerate of the juristic person. The Japanese jurist holds concept of the Civil Law-based countries originates in France and Germany. The more specific law to support the criminal measure is observed which deals with most of financial, economic, peaceful harassment performed by the criminal juristic person.<sup>467</sup>

In Japan, to punish a juristic person which committed a criminal offense that might affect the country's economy, finance, and peace; it required a special law because Japan had the same beliefs as countries that used Civil Laws. In other words, the beliefs were that a juristic person did not physically exist and then it could not take a criminal action and be punished unless otherwise stated in some laws<sup>468</sup>. By considering this statement, it should be focused on the Act Preventing Escape of Capital to Foreign Countries Article 207; "In case where any representative of a juridical person (including a non-incorporated association which has internal rules providing for a representative or administrator; the same shall apply hereinafter in this paragraph and the next paragraph), or agent, employee, or other worker of a juridical or natural person, conducted an act, in regard to business or property of such juridical or natural person in violation of the provisions set forth in each item below, the person who conducted such an act shall be imposed a penalty; in addition, the juridical person shall be imposed the penalty of fine set forth in each such item; and the natural person shall also be

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<sup>467</sup> B.E. Aronson, "Learning from Comparative Law in Teaching U.S. Corporate Law: Director's Liability in Japan and the U.S.," Penn State International Law Review, , 22(2) (2003): 213-242.

<sup>468</sup> Robinson, A. A., "Corporate Culture as a Basic for the Criminal Liability of Corporations ".

imposed such fine as prescribed in each applicable article ... [article sets out fine amounts]”.<sup>469</sup>

At the same issue, it can be also focused on the Article 164(1)<sup>470</sup> of the Income Tax Act 1965; “In a case where a representative of a legal person, or an agent, an employee, or a worker of other types, of a legal or a natural person, violated regulations as provided in Article 159, para 1 (Corporation Income Tax Act 2010)<sup>471</sup>, Article 160

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<sup>469</sup> *Ibid.*

<sup>470</sup> Japan Income Tax Act 1965, Article 164(1) The amount of income tax imposed on a nonresident shall be calculated by applying the provisions of Subsection 1 of the next Section (Comprehensive Income Taxation on Nonresidents) to domestic source income listed in each of the following items for the category of nonresident listed in the relevant item:

(i) A nonresident who has, in Japan, branch offices, factories or any other fixed places for conducting a business which are specified by a Cabinet Order: All domestic source income

(ii) A nonresident who has carried out construction, installation, assembly or any other work or provided services for directing and supervising such work (hereinafter referred to as “construction work, etc.” in this Article) in Japan for more than one year (excluding a nonresident who falls under the preceding item): Any of the following domestic source income:

(a) Domestic source income listed in Article 161 (i) to (iii) (Domestic Source Income)

(b) Domestic source income listed in Article 161 (iv) to (xii), which is attributed to the business related to construction work, etc. that is conducted by the nonresident in Japan

(iii) A nonresident who has, in Japan, a person who is authorized to conclude a contract on his/her behalf or any other person equivalent to such an authorized person specified by a Cabinet Order (hereinafter referred to as an “agent, etc.” in this Article) (excluding a nonresident who falls under item (i)): Any of the following domestic source income:

(a) Domestic source income listed in Article 161 (i) to (iii)

(b) Domestic source income listed in Article 161 (iv) to (xii), which is attributed to the business conducted by the nonresident in Japan via the said agent, etc.

(iv) A nonresident other than one listed in the preceding three items: Any of the following domestic source income:

(a) Domestic source income listed in Article 161 (i) and (i)-3 which has arisen from the utilization or holding of assets located in Japan or the transfer of real estate located in Japan, or any such income which is specified by a Cabinet Order

(b) Domestic source income listed in Article 161 (ii) and (iii)

<sup>471</sup> Japan Corporation Income Tax Act 2010, Article 159, para 1: When a corporation has evaded corporation tax by fraud or other illegal practices with respect to the amount of the corporation tax under Article 74 (1) (ii) (Corporation tax amount of final return) (including the cases where applied mutatis mutandis pursuant to Article 145 (1) (Application mutatis mutandis to foreign corporations)) (where the corporation has the amount to be credited by Article 68 (Income tax credit) (including the cases where applied mutatis mutandis pursuant to Article 144 (application mutatis mutandis to foreign corporation)) or Article 69 (Foreign tax credit), it shall be computed without applying the provisions of those Articles); the corporation tax under Article 81-22 (1) (ii) (Corporation tax amount of consolidated final return) (where

(crime of no submitting final declaration)<sup>472</sup>, or Article 162 (crime of submitting deceptive intermediate declaration)<sup>473</sup> in the process of carrying out business pertaining

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the corporation has the amount to be credited under Article 81-14 (Income tax credit for consolidated accounting period) or 81-15 (Foreign tax credit for consolidated accounting period), it shall be computed without applying the provisions of those Articles); or the corporation tax under Article 89 (ii) (Corporation tax amount of final return for retirement pension fund, etc.) (including the cases where applied mutatis mutandis pursuant to Article 145-5 (Application of other articles to foreign corporation with necessary modifications)); or when a corporation has received refunds of corporation tax by fraud or other illegal practices under Article 80 (6) (Refunds due to carry back of deficit) (including the cases where applied mutatis mutandis pursuant to Article 81-31 (4) (Application of another article made mutatis mutandis to consolidated parent corporation) or Article 145 (1)), the representatives (including administrators of a non-juridical association, etc. and individuals who are trustees of corporate taxation trust; hereinafter the same applies up to Article 162 (Crime of filing interim return in making false entries or the like)), deputies, employees, and other workers (in the case where such corporation is a consolidated parent corporation, it includes the representatives, deputies, employees, and other workers of the consolidated subsidiary corporation; the same applies in Article 163 (1) (Joint punishment provision) of the corporation who have committed such illegal acts shall be punished with penal servitude for not more than ten years or with fine of not more than 10,000,000 yen or with both at the same time.

<sup>472</sup> Japan Corporation Income Tax Act 2010, Article 160 When a corporation, without any justifiable reason, has failed to file a return under Article 74 (1) (Final return) (including the cases where applied mutatis mutandis pursuant to Article 145 (1) (Application mutatis mutandis to foreign corporations)), Article 81-22 (1) (consolidated final return) or Article 89 (Final return for retirement pension fund, etc.) (including the cases where applied mutatis mutandis pursuant to Article 145-5 (Application of other Articles to foreign corporations with necessary modifications)), by the due date of filing, the representatives, deputies, employees, and others of the corporation who have committed the violation shall be punished with penal servitude for not more than one year or with fine of not more than 500,000 yen. However, the punishment may be remitted depending upon the circumstances.

<sup>473</sup> Japan Corporation Income Tax Act 2010, Article 162 A person who falls under any of the following respective items shall be punished with penal servitude for not more than one year or with fine of not more than 500,000 yen:

(i) A representative, deputy, employee, and others of a corporation who have committed the violation in making a false entry in a return under Article 71 (1) (Interim return) (including the cases where applied mutatis mutandis pursuant to Article 145 (1) (Application of other articles to foreign corporations)) in which the matters listed in the respective items of Article 72 (1) (Matters to be stated in interim return in the case of provisional settlement of accounts) have been entered, in a return under Article 81-19 (1) (Consolidated interim return) in which the matters listed in each item of Article 81-20 (1) (Matters to be stated in consolidated interim return in the case of provisional settlement of accounts), or in a return (including the overdue date return of the said return) under Article 88 (Interim return for retirement pension fund, etc.) (including the cases where applied mutatis mutandis pursuant to Article 145-5 (Application of other articles to foreign corporations)), and filing it with the district director ;

(ii) A person who has made no answer or made a false answer to inquiries by officials concerned pursuant to Article 153 or Article 154 (1) or (2) (Authority of inquiry and inspection by officials concerned) (including the cases where applied mutatis mutandis pursuant to Article 155 (Application mutatis mutandis to authority of inquiry and inspection)) or who has refused, obstructed or evaded the inspection under those Articles ;

to the said legal or natural person, the primary actor shall be punished. In addition, the said legal or natural person shall be fined pursuant to the aforesaid articles.”<sup>474</sup>

The juristic person could express its intention through its legal representative such as a committee. If the legal representative took an action according to the juristic person’s objective, then the intention would obligate the juristic person. As a result, the legal representative’s intention was considered as that of the juristic person. Accordingly, the juristic person might intent to commit the action or offense. Then, the juristic person must receive a reasonable criminal punishment. By considering this statement Robinson (2008) shown some example of the Unfair Competition Prevention Act Article 22(1) of Japan: “When a representative of a juridical person, or an agent, employee or any other [sic] of a juridical person or an individual has committed a violation prescribed in any of the provisions of the following items with regard to the business of said the juridical person or said the individual, not only the offender but also said the juridical person shall be punished by the fine specified by the respective items, or said the individual shall be punished by the fine prescribed in the relevant article: [article lists fines]”<sup>475</sup>

### 3.3.3 Germany

The general take on Corporate Criminal Liability in Germany does not exist, and not necessarily in this order. Those who look a little more closely at German legal history notice. However, the story is not quite so simple because Corporate Criminal Liability did exist in Germany at some point. The more sophisticated story is that German Corporate Criminal Liability, the act of the juristic person shall not over the

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(iii) A person who has presented books and documents, in which he has made false entries or records, in relation to the inspection under the preceding item.

<sup>474</sup> Aronson, B. E., "Learning from Comparative Law in Teaching U.S. Corporate Law: Director's Liability in Japan and the U.S.," Penn State International Law Review, .

<sup>475</sup> Robinson, A. A., "Corporate Culture as a Basic for the Criminal Liability of Corporations ".

limitation of the individual person (ordinarily, one is content here to remark that the historical record is mixed, rather than exploring in any detail the extent, duration, and foundation of German Corporate Criminal Liability).

The concept is similar to the French Principle that the juristic person is incapable to perform crime with common deliberated ground. The criminal offence against the juristic person requires to having some specific laws to support the criminal measure. The offence involves most of peaceful or economic harassment.<sup>476</sup> It can say that, under German Law only natural persons can be punished as offenders. Legal persons lack the capacity to act and the capacity to be criminally liable. Therefore, generally speaking they cannot be prosecuted or punished as individual offenders.<sup>477</sup>

In particular, it is not possible to impose the two main punishments under German Law, namely fines or imprisonment, against a company. German Civil Code states penalties for a juristic person who violates the law in the Sections 823 – 853 in the Title 27 regarding Torts. Nevertheless, the provisions do not clarify the penalties. Consequently, the Section 31<sup>478</sup> in the title 2 of German Civil Code is used to consider a juristic person who taken a wrongful action in Germany.

In Germany, the Piercing the Corporate Veil is used in various manners as happened in England and the United States. For instance, if a juristic person takes an illegal action or any action in order to hide the real culprit, then courts may follow the principle of good faith in the Piercing the Corporate Veil. For example, a major

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<sup>476</sup> S. Beck, "Mediating the Different Concepts of Corporate Criminal Liability in England and Germany," *German Law Journal*, , 11(10) (2010): 1093-1114.

<sup>477</sup> *Ibid.*

<sup>478</sup> German Civil Code of August 1896, last amended by statute of 4 December 2008/2586, Section 31 liability of an association for organs. The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which it or he is entrusted, where the act gives rise to a liability in damages.

shareholder in a company may intent to cause damage(s) to his or her creditor by mixing his or her assets with the company's assets. Thus, the shareholder must be responsible for the company's debt(s). This includes that case which the company may have inappropriately low registered capital. The liability of the shareholder may rise in one man and subsidiary companies. Without good faith, German Courts do not follow the Piercing the Corporate Veil in order to prevent and solve a problem caused by a juristic person that is considered as immoral use of right. This immoral use of right is an abuse of right and illegal action. This principle is used if a shareholder of a company mixes his or her assets with the company's assets and cause a problems in separating the assets. In that case, the shareholder is panelized.<sup>479</sup>

From the explanations about can say that, Corporate Criminal Liability has been controversial quite long since skepticism has intercrossed among the opposition sides. Originally, the juristic person on the ground evidence is not an offence of crime due to "*Mens rea*". Being considered the decisive idea brought over by Lord Holt, he provided in his addendum in the court case from which his judgment was made in 1701. His dictum concluded that the penalty shall be made solemnly against the ordinary person who founded the company. Wisely, the original ground has gradually begun to change in the stated countries applied with the Common Law in particulars when the shift has varied toward the evolving changes of development and an essence of trading importance performed by the juristic person with great role. Currently, the contemporary jurists have agreed the Penal Code is applicable to absolute ground charge against the juristic person. On the other hand, the hypothesis of the penalty against the juristic person has dramatically been evolved and applied extensively in the United Kingdom and the United States of the Common Law states while some of the

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<sup>479</sup> Dubber, M. D., "Comparative History and Theory of Corporate Criminal Liability," New Criminal Law Review.

applied Civil Law countries have been proven sluggish and some other countries decline to its jurisdiction in practicality.<sup>480</sup>

Based on the aforementioned, the Civil Law's Legitimacy System toward its practicality remains unsettled whereas the criminal offence of the juristic person be related to the conclusion of the court case has applied the Common Law in its practicality of the penalty against the juristic person. In fact, the theoretical practice for supporting the rational jurisdiction in making decision of the case is yet non-logical.<sup>481</sup> According to Nicholas (2014) it is believed that legalized persons are divided into 2 categories; ordinary person and juristic person, of which the ordinary person has no doubt of its status and perpetration. While, the controversy of the terminological mean stands out there prompting to be discussed and educated accordingly in the legitimating system agenda. All this explanation is the principle of the role taken by the juristic person in terms of relationship between the juristic person and the corporate representative.<sup>482</sup>

### 3.4 Common Punishments for Juristic Persons in Other Countries

In the past, imprisonment was the punishment for almost all culprits regardless of the severity of their actions because it did not only isolate the culprits from their societies, but it could also make them afraid of commit wrongful actions again. Consequently, the number of prisoners was too high for available prisons. The prisons also became the places for learning methods for committing serious offences. Although,

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<sup>480</sup> Khanna, V. S., "Corporate Criminal Liability: What Purpose Does It Serve?," Harvard Law Review.

<sup>481</sup> Anderson, M. J., and Waggoner, I. , "The Changing Role of Criminal Law in Controlling Corporate Behavior Rand Corporation.."

<sup>482</sup> Nicholas, J., "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany.," Criminology & Criminal Justice: An International Journal.

governments tried to increase the number of prisons, the problem still existed<sup>483</sup>. Subsequently, many countries such as the United States and Australia imprisoned only culprits with serious offenses, while those with mild offenses were arrested and confined at their homes or other places. These changes could significantly reduce the expenses from imprisonments and prevent those with mild offenses to learn from the ones with serious offenses.<sup>484</sup>

Legally, the juristic person has the same rights, duties and responsibilities as an individual, except for the special rights, duties and responsibilities for the individual. Thus, the juristic person has the same criminal responsibilities as the individual. However, the juristic person cannot be executed, imprisoned or confined since it does not physically exist and must take action(s) through an individual person(s). Besides, the important factors, as a source for penalty, of the supporting evidences of criminal offence against the juristic person are<sup>485</sup> 1) The public importance as a stakeholder. 2) The reduction of profits performed by the juristic person. 3) The preventive measures of repeatedly further criminal offences. 4) An offence of the infringement.

In terms of public importance as the stakeholder, the adjudication of the domestic courts in the Common Law-based countries have always concerned with relative evidences of the public importance as the stakeholder when the public opinion demands the trend of lifestyle even though, the debates are raised from the element grounds. The pro-enthusiast has provided, the public as the stakeholder or the peacefulness of the public should be priority and does not related to the deliberation of criminal ground. The evidence was a sample of the economic offence in the case *New*

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<sup>483</sup> S. Fitzgibbon, "That Man Is You - the Juristic Person and Faithful Love," International Journal of the Jurisprudence of the Family, 1 (2010): 259-288.

<sup>484</sup> Khanna, V. S., "Corporate Criminal Liability: What Purpose Does It Serve?," Harvard Law Review.

<sup>485</sup> M. Beulay, "The Action of Legal Persons in the European System of Human Rights Protection - Collective or Individual Interest?," Law & Practice of International Courts & Tribunals, 12(3) (2013): 321-341.

*York Central & Hudson River Railroad Co. v. United States* which was adjudicated by the court in that “The business performance executed by the corporate person is acquired to be limited by the public utility. So, the business performance shall be considered as executed by the company which also shall be pleaded as guilty.”<sup>486</sup>

The case mentioned above indicates that the public agenda may be beyond the theory of law when the penalty of the criminal juristic person in economic harassment is served to the public interest. The adjudication may prevent any juristic person from performing business illegally but being obedient under the criminal measure from the time being. It can say that, currently observe criminal offences of several court cases against the juristic person as the partnerships and companies in trades, economy and financing actions which no consideration of criminal deliberation is to be responsive by the measures.<sup>487</sup>

The similarity is observed in Civil Law System when several business firms are grounded and penalized under the criminal offences of economic violation namely; offence relating to deliberately hidden inventory of goods, to transport rice goods across the concessional province under the given licenses and to be faulted statement of mining business accounts. All are similar samples of France’s adjudication to the Common Law-based countries when compared including the case of the *New York Central & Hudson River Railroad Co. v. United States* in which judge day reviewed the court does not find out the constrained law to be followed and provided rationales under the peaceful public interest since the company gaining benefits from such business performance shall be penalized. In the history, the reduction of profits performed by the juristic person was not fulfilled by the effective law when the violation of law was proven. Only, the ordinary person who was considered as implementing tool shall be

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<sup>486</sup> Diskant, B. E., "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," *The Yale Law Journal*, .

<sup>487</sup> D. Travers, "Towards Professional-Model Regulation of Directors' Conduct.," *International Journal of Law & Management*, ., 55(2) (2013): 123-140.

punished and the company shall make benefits from the reduction of profits or other profits.<sup>488</sup>

In terms of reduction of profits performed by the juristic person can be explained that, the pro-supporters considered limiting the illegal business performance of the juristic person from a huge fortune without penalty since the rational comments targeted at the corporate representative who is not authorized or overdone under the corporate objectives. They added when the illegal performance of the corporate agent gained increasingly, the juristic person shall be charged as criminal offence and more or less the fine measure shall be applied in order that the fund is legally taken away from the possession of the juristic person otherwise, the shareholder can gain undue enrichment. This is corresponded to the adjudication of the French Criminal Code. It can be explained that when the benefits gained by the corporate objectives are achieved, any wrongful act happened shall not be denied by the related person or the department.<sup>489</sup>

In terms of prevention measures of further repeatedly criminal offences can be explained that, the penalty of the ordinary person instead of the juristic person will always be useless to prevent them from further repeatedly criminal offence. In fact, the economic offence of criminal ground performed by the executives namely businessmen and traders are caused by the mismanagement rather than the employee's manipulation. It is hard to identify who is a real actor even it is known that.<sup>490</sup> Technically, the actions manipulated by any of the employees usually are assigned by the authorized personnel like the executive and the corporate agent from a certain position who may be penalized. The penalty may not be a key to prevent them from intimidation. Therefore, the repeatedly crime offences may reoccur in the same or different corporate firms. The

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<sup>488</sup> Evans, C. L., "Case for More Rational Corporate Criminal Liability: Where Do We Go from Here," Stetson Law Review, .

<sup>489</sup> G. Rusche, "Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice.," Social Justice, , 40(2) (2014): 252-264.

<sup>490</sup> *Ibid.*

company, which the juristic person appears to be rich and shared with high profits when compared to their competitors as the illegal performers.<sup>491</sup>

The restrict measure on this may be solely for a criminal offence against the juristic person. The United States and France's Courts have the same results of the adjudication which is put criminal offence against the juristic person. Only, Thai Court judge may not appear in applying penalty by the context. According to the French Criminal Code, the ordinary person may perform illegally, it is a criminal offence against the juristic person as the person acts on behalf of it.<sup>492</sup>

On the other hand, Dubber (2013) explains the tendency of the adjudication currently is put a criminal offence against both the juristic person and the ordinary person. The sample was brought over from the French Code of Criminal Procedure. It is suggested by adjudication when the Pro supporter reviewed the use of this measure by the penalty taken for the juristic person is enabled to make them intimidated and the sequence may prevent the corporate agent in a certain position and the others down. Overall, the penalty measure requires balance of the criminal groups to be applied against members of the company. Otherwise, the use of this measure would never be successful to prevent them from criminal offence. The measure may be the result of the French Code of Criminal Procedure.<sup>493</sup>

In terms of an offence, the infringement can be explained that, The Pro-supporters reviewed on this measure that an offence of the Civil Code by the juristic person shall be in the similar way of applying the criminal offence since both grounds are relatively in effect on the others. It is noted that if the performance of the corporate

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<sup>491</sup> K. Gibson, "Toward an Intermediate Position on Corporate Moral Personhood.," Journal of Business Ethics, 101 (2011): 71-81.

<sup>492</sup> Robson, R. A., "Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability," American Business Law Journal, .

<sup>493</sup> Dubber, M. D., "Comparative History and Theory of Corporate Criminal Liability," New Criminal Law Review, .

representative causes to an offence of the infringement, the same manner also is a charge with a criminal offence against the juristic person. So, the Respondent Superior is usually considered as a criminal offence through all means.<sup>494</sup> Besides, the extensive measure has been accepted widely as both the criminal and the civil offences are not usually differentiated from each other. Logically, in particular the criminal offence is considered as an offence of the infringement. Hence, the Vicarious Responsibility is determined in applying it for a criminal offence.<sup>495</sup>

An opinion is the juristic person has criminal liabilities when a person(s) managing the juristic person or the juristic person's representative(s) witnessed and intent to commit a criminal offense (i.e. the doctrine of identification or directing mind and will). Another opinion is an action(s) of the juristic person involves with a number of individuals and may lead to a criminal liability (liabilities). Accordingly, if the juristic person did not reasonably prevent the individual(s) to commit a wrongful action(s), then the juristic person must have the criminal liability (liabilities) (i.e. organizational blameworthiness doctrine).<sup>496</sup>

In the United States, Beale and Safwat (2004) explain the doctrine of "Respondent Superior" that supports the organizational blameworthiness doctrine is used for identifying the liability (liabilities) of the juristic person. According to the Section 2.07 of the Model Penal Code of the American Law Institute, the juristic person has the criminal liability (liabilities) in the following cases: 1) A criminal offense(s) is committed by an employee(s) of the juristic person in its name, 2) A legal duty (duties) of the juristic person is abandoned and/or 3) A wrongful action(s) is taken by a person

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<sup>494</sup> Bucy, H. T., "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," Minnesota Law Review.

<sup>495</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review.

<sup>496</sup> D.M. Amann, "Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights," Hastings International and Comparative Law Review, 24(3) (2001): 327-388.

authorized by the top management in the name of the juristic person. The punishments for the juristic person are such as fine and forfeiture.<sup>497</sup> According to the Common Laws in the United States, there are various forms of the punishments for the juristic persons as follows;<sup>498</sup>

- (1) Fine – The amounts of fines will be consistent with the juristic persons' financial statuses and sizes.
- (2) Probation – The juristic person has to conduct community services. For instance, in the case of *Unites States v. Mitsubishi International Corp.*, 677 F.2d785 (9th Cir. 1982), the court could fine the defendant for not more than 20,000 dollars per each damage. Although, the defendant was fined only for 1,000 dollars. The defendant was probated with a special condition that its management had to support the development of the Community Alliance Program for one year and give 100,000 dollars to the program for each wrongful act.<sup>499</sup>
- (3) Confiscation – The properties that the juristic person obtained from their wrongful acts must be confiscated. These properties also include resulting benefits and the third parties' properties used for taking the wrongful acts. Not only, the involvement of the third parties in the wrongful acts, but the third parties' negligence that caused the used of their properties for the wrongful acts are also considered. Therefore, the properties must be confiscated.

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<sup>497</sup> S.S. and Safwat Beale, "What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability," Buffalo Criminal Law Review., 8(1) (2004): 86-164.

<sup>498</sup> F. Mazzacuva, "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the Uk and Us Systems of Criminal Justice.," Journal of Criminal Law., 78(3) (2014): 249-262.

<sup>499</sup> D.J. Curran, "Probation for Corporations under the Sentencing Reform Act," Santa Clara Law Review., 26(3) (1986): 785-808.

- (4) Victim notification – This is a measure for reducing the juristic person’s reliabilities by notifying victims by post, newspaper or other media.
- (5) Restitution – This is a civil measure. For example, in case of violation, a court may decide that a juristic person has to work for an injured person who has to take a sick leave.

It can be seen that the punishments for the juristic person in the United States include both Civil and Criminal punishments in order to achieve the objectives of the punishments as much as possible. Besides, In the United States, laws specify that a committee(s), director(s) or manager(s) has criminal liability (liabilities) if his or her juristic person commits a criminal offense(s) and he or she acknowledges the offense(s). For instance, Section 2070 of the Consumer Product Safety Act, (15 U.S. Code)<sup>500</sup> indicates that if a committee(s) or representative(s) of a juristic person acknowledges or intends to take an illegal

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<sup>500</sup> Consumer Product Safety Act, (15 U.S. Code), Section 2070 Criminal penalties

(a) Violation of section 2068 of this title is punishable by -

- (1) imprisonment for not more than 5 years for a knowing and willful violation of that section;
- (2) a fine determined under section 3571 of title 18; or
- (3) both.

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 2068 of this title shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

(c)(1) In addition to the penalties provided by subsection (a), the penalty for a criminal violation of this chapter or any other Act enforced by the Commission may include the forfeiture of assets associated with the violation.

(2) In this subsection, the term "criminal violation" means a violation of this chapter or any other Act enforced by the Commission for which the violator is sentenced to pay a fine, be imprisoned, or both.

action(s) (Section 2068), the person(s) will be punished according to the laws<sup>501</sup> or Section 24 of the Monopolies and Combinations in Restraint of Trade (15 U.S. Code).<sup>502</sup>

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<sup>501</sup> Consumer Product Safety Act, (15 U.S. Code), Section 2068 Prohibited acts

(a) Designation

It shall be unlawful for any person to -

(1) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is regulated under this chapter or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under this chapter, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission;

(2) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is -

(B) subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action;

(C) subject to an order issued under section 2061 or 2064 of this title; or

(D) a banned hazardous substance within the meaning of section 1261(q)(1) of this title;

(3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this chapter or rule thereunder;

(4) fail to furnish information required by section 2064(b) of this title;

(5) fail to comply with an order issued under section 2064(c) or (d) of this title (relating to notification, to repair, replacement, and refund, and to prohibited acts);

(6) fail to furnish a certificate required by this chapter or any other Act enforced by the Commission, or to issue a false certificate if such person in the exercise of due care has reason to know that the certificate is false or misleading in any material respect; or to fail to comply with any requirement of section 2063 of this title (including the requirement for tracking labels) or any rule or regulation under such section;

(7) fail to comply with any rule under section 2058(g)(2) of this title (relating to stockpiling);

(8) fail to comply with any rule under section 2076(e) of this title (relating to provision of performance and technical data);

(9) fail to comply with any rule or requirement under section 2082 of this title (relating to labeling and testing of cellulose insulation);

(10) fail to file a statement with the Commission pursuant to section 2067(b) of this title;

(11) fail to furnish information required by section 2084 of this title.

(12) sell, offer for sale, distribute in commerce, or import into the United States any consumer product bearing a registered safety certification mark owned by an accredited conformity assessment body, which mark is known, or should have been known, by such person to be used in a manner unauthorized by the owner of that certification mark;

(13) misrepresent to any officer or employee of the Commission the scope of consumer products subject to an action required under section 2061 or 2064 of this title, or to make a material misrepresentation to such an officer or employee in the course of an investigation under this chapter or any other Act enforced by the Commission; or

(14) exercise, or attempt to exercise, undue influence on a third party conformity assessment body (as defined in section 2063(f)(2) of this title) with respect to the testing, or reporting of the results of testing, of any product for compliance under this chapter or any other Act enforced by the Commission,

In France, it was accepted that a juristic person could have criminal liability (liabilities) in 1992 as stated in Section 121-122 of the Criminal Code that “[a] juristic person that is not the government shall have the criminal liability (liabilities) for a wrongful action(s) taken by itself or its representative(s) under Sections 121-4 and 121-7 as well as other laws.”<sup>503</sup> Therefore, the juristic person has the criminal liability (liabilities) in the following cases;<sup>504</sup>

- (1) The juristic person has the criminal liability (liabilities) for a wrongful action(s). It can say that, the Criminal Code and Specific Laws (e.g. anti-counterfeiting laws) state the cases that the juristic person has the criminal liability (liabilities).

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or to subdivide the production of any children's product into small quantities that have the effect of evading any third party testing requirements under section 2063(a)(2) of this title;

(15) export from the United States for purpose of sale any consumer product, or other product or substance regulated by the Commission (other than a consumer product or substance, the export of which is permitted by the Secretary of the Treasury pursuant to section 2066(e) of this title) that -

(A) is subject to an order issued under section 2061 or 2064 of this title or is a banned hazardous substance within the meaning of section 1261(q)(1) of this title; or

(B) is subject to a voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public; or

(16) violate an order of the Commission issued under section 2067(c) of this title.

(b) Exception

Paragraphs (1) and (2) of subsection (a) of this section shall not apply to any person

(1) who holds a certificate issued in accordance with section 2063(a) of this title to the effect that such consumer product conforms to all applicable consumer product safety rules, unless such person knows that such consumer product does not conform, or

(2) who relies in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to an applicable product safety rule.

<sup>502</sup> The Monopolies and Combinations in Restraint of Trade (15 U.S. Code), Section 24 liability of directors and agents of corporation. Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

<sup>503</sup> See Footnote No. 443.

<sup>504</sup> M. Peith, and Ivory, R. , "Corporate Criminal Liability: Emergence, Convergence, and Risk "(Springer Science & Business Media., 2011).

- (2) A wrongful action(s) is taken by the juristic person or its representative(s). It can say that, the juristic person's representative means a person or group of persons with decision making and managerial powers. This includes a proxy (proxies) (préposé-mandataire) and authorized person(s) (préposé-déléataire). Its action(s) also include infractions par omission.
- (3) A wrongful action(s) is taken in the name of the juristic person for its own benefit(s). It can say that, there are a number of actions for the benefits of the juristic person. The actions do not only relate to profit making or expense reduction, but they also involve with the achievement(s) of the juristic person's objective(s).

There are two types of punishments for the juristic person with a criminal offense(s): fine and specific punishment (Article 131-17 of the Criminal Code)<sup>505</sup>.

- (1) Fine- under the Article 131-17, a juristic person with an offense(s) shall be fine not more than five times of the fine for an individual with an offense(s).<sup>506</sup> Under Articles 132-12 to 132-15, the juristic person who fined and committed the same offense(s) shall be fined not more than ten times of the fine for an individual with an offense(s).<sup>507</sup>

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<sup>505</sup> French Criminal Code, Article 131-17. A regulation which sanctions a petty offence of the fifth class may also provide for the additional penalty of prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, for a maximum period of three years.

A regulation which sanctions a petty offence of the fifth class may also provide, as an additional penalty, the imposition of community service for a period of twenty to a hundred and twenty hours.

<sup>506</sup> *Ibid.*

<sup>507</sup> French Criminal Code

Article 132-12 (Ordinance No. 2000-916 of 19 September 2000, Article 3 Official Journal of 22 September 2000 into force 1 January 2002).

- (2) Specific punishment under the Article 131-39<sup>508</sup> of the Criminal Code, there are nine punishments as follows;

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Where a legal person, having already received a final sentence for a felony or a misdemeanour legally punishable with a fine of €100,000 in the case of a natural person, incurs Criminal Liability for a felony, the maximum fine which may be imposed is ten times that provided by the law applicable to that felony. In such a case the legal person is additionally liable to the penalties enumerated under article 131-39, subject to the provisions of the last paragraph of that article.

Article 132-13 (Act no. 2001-504 of 12 June 2001 Article 15 Official Journal of 13 June 2001) (Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002).

Where a legal person which has already received a final sentence in relation to a felony or a misdemeanour legally punishable in the case of a natural person by a fine of €100,000 incurs Criminal Liability for a misdemeanour punishable by the same penalty within a period of ten years from when the previous sentence expired or became time-barred, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

Where a legal person which has already received a final sentence for a felony or for a misdemeanour legally punishable in the case of natural persons by a fine of €100,000, incurs within a period of five years from when the previous sentence expired or became time-barred Criminal Liability for a misdemeanour which by statute is punishable in the case of natural persons with a fine of more than €15,000, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

Article 132-14, where a legal person which has already received a final sentence for a misdemeanour incurs within a period of five years from when the previous sentence expired or became time-barred Criminal Liability for either the same-misdemeanour or a misdemeanour assimilated to it under the rules governing recidivism, the maximum fine which may be imposed is ten times that provided for natural persons by the statute punishing the misdemeanour.

Article 132-15, where a regulation so provides, a legal person which has already received a final sentence for a petty offence of the fifth class incurs Criminal Liability for the same petty offence within a period of one year from when the penalty for the of the previous offence expired or became time-barred, the maximum fine which may be imposed is ten times that provided for natural persons by the regulation punishing the petty offence.

<sup>508</sup> French Criminal Code, Article 131-39

(Act no. 2001-504 of 12 June 2001 Article 14 Official Journal of 13 June 2001)

(Act no. 2004-575 of 21 June 2004 article 2 III Official Journal of 22 June 2004)

Where a statute so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:

- 1° dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;
- 2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;
- 3° placement under judicial supervision for a maximum period of five years;
- 4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;
- 5° disqualification from public tenders, either permanently or for a maximum period of five years;
- 6° prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;

- 2.1 The juristic person's business(es) shall be stopped if the juristic person commits a serious offense(s).
- 2.2 The juristic person shall not conduct some types of businesses for not longer than five years or without a specific period.
- 2.3 The juristic person shall be controlled by a court officer(s) for not longer than five years or without a specific period.
- 2.4 The juristic person's business(es) shall be closed down for not longer than five years or without a specific period.
- 2.5 The juristic person's right to bid for the government's procurement project(s) shall be waived for not longer than five years or without a specific period.
- 2.6 The juristic person must not raise a fund from the public for not longer than five years or without a specific period.
- 2.7 The juristic person must issue a cheque(s) for not longer than five years or without a specific period.
- 2.8 The juristic person's property (properties) used for and obtained from a wrongful action(s) shall be forfeited.
- 2.9 The decision(s) of a court(s) shall be posted or announced.

Considering the capital and intermediate punishments can be categorized as follows;

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- 7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;
  - 8° confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it;
  - 9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

The penalties under 1° and 3° above do not apply to those public bodies which may incur Criminal Liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers.

- (1) Fine punishments are separated for individual and juristic person. The amounts of the fines for the juristic persons are five time higher than for the individuals.
- (2) Special punishments for the juristic person can be categorized as follows;<sup>509</sup>
- 2.1 Dissolution – This punishment is used in the case that a juristic person takes a serious wrongful act. This punishment is equal to the imprisonment for an individual for three years or longer and the execution. This punishment is suitable for juristic person that have been established for a long time and take serious wrongful acts.
  - 2.2 Operation prohibition or revocation of licenses (i.e. interdiction d'exercer une activitee) - this punishment takes no longer than five years. The purpose of this punishment is to restrict the juristic persons' liberties to conduct their businesses. It is equal to the imprisonment for the individuals.
  - 2.3 Detention (i.e. placement sous surveillance judiciaier) - This punishment takes no longer than five years. The punished juristic persons must ask the permissions from courts before taking actions. They may also be investigated at any time.
  - 2.4 Cessation (i.e. fermeture) – This punishment has no time limit. The punished juristic persons' branches that causes problems may be closed. For instance, the juristic person's factory that cause an environmental problem by releasing its waste water into the environment may be closed down, while the head office can still operate.
  - 2.5 Exclusion from public bidding (i.e. exclusion des marches publics) – This punishment may have no time limit or it may take no longer

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<sup>509</sup> Evaluated from French Criminal Code, Article 131-39.

than five years. The purpose of this punishment is to reduce the juristic persons' incomes.

2.6 Prohibition on public fundraising (i.e. interdiction de faire appel public a l' epargne) - This punishment may have no time limit or it may take no longer than five years. The prohibition may cover loans from financial institutions and individuals. This punishment is an obstacle for the juristic person to conduct and expand their businesses because of the lack of financial liquidity.

2.7 Prohibition on the uses of cheque or credit cards (i.e. interdictiond' emettre des cheques) - This punishment takes no longer than five years.

2.8 Confiscation (i.e. interdictiond' emettre des cheques) - The properties that the juristic person used for taking or obtain from their wrongful acts are confiscated.

2.9 Victim notification - The purpose of this punishment is to decrease the juristic persons' reputations through newspaper, radio or other media.

In terms of light punishments are as follows;<sup>510</sup>

(1) Fine- The highest rate of fines for the juristic person is five times higher than for the individuals.

(2) Prohibition on cheque issuance - This punishment is no longer than one year. This does not cover issuing cheque for withdrawing money or credit cards.

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<sup>510</sup> Pop, I.A. (2006)

The punishments for the juristic person in France are stated in the Criminal Code of French. With these punishments, the juristic person carefully conducts their businesses in order to avoid affecting or damaging the other persons or the public because the punishments can directly affect to the juristic person, not their representatives. As a result, the number of the juristic persons' wrongful acts is significantly reduced according to the objectives of the punishments.<sup>511</sup>

By considering the criminal liability (liabilities) of the juristic person's representative(s), the representative(s) may involve in a wrongful action(s) since the juristic person does not physically exist and must take an action(s) through an individual(s). Accordingly, it is commonly accepted that if the representative(s) involve in a criminal offense(s), then the representative(s) will have criminal liability (liabilities) in order to prevent the juristic person to be used as a medium for taking a wrongful action(s).<sup>512</sup>

Moreover, the corporation penalty in France can be considered the French Criminal Code Article 121-2 (para 3) and Article 121-3 (para 4)<sup>513</sup> which indicate that if the juristic person commits a criminal offense(s), then 1) the individual(s) who caused or involved in the criminal offense(s), 2) did not prohibit the criminal offense(s), 3)

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<sup>511</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review.

<sup>512</sup> Beale, S. S., "A Response to the Critics of Corporate Criminal Liability," American Criminal Law Review.

<sup>513</sup> French Criminal Code

Article 121-2 (para 3). The Criminal Liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

Article 121-3 (para 4). In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware.

abandon his or her duty (duties), or 4) did not prevent the others to know the danger(s) or damage(s) that they should be informed will have criminal liability (liabilities).<sup>514</sup>

After, considering the liability of the juristic person in French Laws, it is found that the laws state all possible conditions. Although, the juristic person that breaks the laws are punished, will a manager of the juristic person be punished? The answer is Yes, because the punishment for juristic persons' criminal actions is stated in the Articles 131-37 to 131-39 of the French Criminal Code<sup>515</sup>. The Articles 131-38 status that the juristic person shall be penalized up to five times of the rate for the natural person who breaks the law. It can be mentioned that if the juristic person breaks the law, then the penalty rate will depend on the rate for the natural person. That is, the court can penalize the juristic person up to five times of the rate. Moreover, the maximum rate for the juristic person was judged to pay for the penalty and breaks the same law again is thirty times of the rate as stated in the Articles 132-12 to 132-14 of the French Criminal Code<sup>516</sup>.

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<sup>514</sup> Beale, S. S., "A Response to the Critics of Corporate Criminal Liability," American Criminal Law Review.

<sup>515</sup> French Criminal Code contain

Articles 131-37. Penalties for felonies and misdemeanours incurred by legal persons are:

1° a fine;

2° in the cases set out by law, the penalties enumerated under Article 131-39.

Articles 131-38, (Act no. 2004-204 of 9 March 2004 article 55 I Official Journal of 10 March 2004)

The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence.

Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000.

Articles 131-39, *See* Footnote No. 498

<sup>516</sup> French Criminal Code

Article 132-12, (Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Where a legal person, having already received a final sentence for a felony or a misdemeanour legally punishable with a fine of €100,000 in the case of a natural person, incurs Criminal Liability for a felony, the maximum fine which may be imposed is ten times that provided by the law applicable to that felony. In such a case the legal person is additionally liable to the penalties enumerated under article 131-39, subject to the provisions of the last paragraph of that article.

In contrast, the maximum rate for the natural person was judged to pay for the penalty and breaks the same law again is two times of the penalty rate as stated in Articles 132-9 to 132-10 of the French Criminal Code<sup>517</sup>. In other words, the juristic person may be penalized at the higher rate than the natural person in the same case.

The structure of many laws state penalties (e.g. the penalty rates for violation of laws) for natural and juristic person in the same cases. Consistently, the laws show that the juristic person may be judged to be punished under the Article 121-2 of the Criminal Code for a violation of any section of these laws (e.g. violation, labor protection, and

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Article 132-13, (Act No. 2001-504 of 12 June 2001 Article 15 Official Journal of 13 June 2001), (Ordinance No. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 into force 1 January 2002)

Where a legal person which has already received a final sentence in relation to a felony or a misdemeanour legally punishable in the case of a natural person by a fine of €100,000 incurs Criminal Liability for a misdemeanour punishable by the same penalty within a period of ten years from when the previous sentence expired or became time-barred, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

Where a legal person which has already received a final sentence for a felony or for a misdemeanour legally punishable in the case of natural persons by a fine of €100,000, incurs within a period of five years from when the previous sentence expired or became time-barred Criminal Liability for a misdemeanour which by statute is punishable in the case of natural persons with a fine of more than €15,000, the maximum fine which may be imposed is ten times that provided by the statute by which the misdemeanour is punishable.

Article 132-14, Where a legal person which has already received a final sentence for a misdemeanour incurs within a period of five years from when the previous sentence expired or became time-barred Criminal Liability for either the same-misdemeanour or a misdemeanour assimilated to it under the rules governing recidivism, the maximum fine which may be imposed is ten times that provided for natural persons by the statute punishing the misdemeanour.

<sup>517</sup> French Criminal Code

Article 132-9. Where a natural person who has already received a final sentence for a felony or for a misdemeanour punishable by law with ten years' imprisonment commits within ten years of when the previous sentence expired or became time-barred a further misdemeanour which is similarly punishable, the maximum term of imprisonment and fine applicable is doubled.

Where a natural person who has already received a final sentence for a felony or misdemeanour punishable by ten years' imprisonment commits within five years of when the previous sentence expired or became time-barred another misdemeanour punishable with between one and ten years' imprisonment, the maximum term of the imprisonment and fine applicable is doubled.

Article 132-10, where a natural person, who has already received a final sentence for a misdemeanour, commits within a period of five years from when the previous sentence expired or became time-barred either the same misdemeanour, or a misdemeanour which is assimilated to it for the purposes of the rules relating to recidivism, the maximum term of the imprisonment and fine is doubled.

right protection laws). The penalties for the juristic person are stated in the Article 131-38 of the French Criminal Code<sup>518</sup>.

Most cases of violations of French Laws by juristic persons include work-related accidents, undocumented workers, misbranding, and other cases. The punishment for the juristic person's crime(s) can be mainly considered from the Article 121-2 of the French Criminal Code<sup>519</sup>. Accordingly, the punishment is under 2 basic principles:

- (1) principe de spécialité (i.e. the juristic person is punished only if laws including criminal and specific laws state relevant punishment)
- (2) principe de rattachement de l'acte à la personne morale (i.e. the juristic person is punished only if the two conditions in the Article 121-2 are met).

For the second principle, it can be stated that the juristic person or its representative who is a person or group of person that is authorized to make decisions and manage the juristic person's business can commit a violation(s) including préposé-mandataire or préposé-déléataire. Accordingly, the objective of the violation must be to provide a benefit(s) for the juristic person. Doubtfully, the mentioned action has a wide definition. It does not only refer to an action that aims to make profits or reduce

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<sup>518</sup> See Footnote No. 505

<sup>519</sup> French Criminal Code, Article 121-2

(Act no. 2000-647 of 10 July article 8 Official Journal of 11 July 2000)

(Act no. 2004-204 of 9 March 2004 article 54 Official Journal of 10 March 2004)

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.

However, local public authorities and their associations incur Criminal Liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The Criminal Liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

expenses, but it also refers to doing a duty according to the objective of the juristic person in order to smoothly operate its businesses even without making profits or providing any benefits for it. Accordingly, the juristic person is punished for its action caused by infractions par omission. The case that the juristic person is not punished if its manager commits a violation for his or her own benefit(s). Nonetheless, if the company receives indirect benefit(s) in that case, then the company will also be responsible for the violation.<sup>520</sup>

Therefore, this can state that the liability of an employer who is the natural or the juristic person for a wrongful act stated in French Laws mainly depends on the Article 121-2 which allows the court to consider the action and judge its manager to be responsible for the action. The manager is not responsible for the action of the juristic person only if the laws clearly state otherwise. If the natural person negligently commits a violation in order to provide any benefit for the juristic person, then the court may seriously punish the juristic person because it is more difficult to punish the manager than the past.

Similarly, this study can consider the German Penal Code of 1998 in order to analyze the liability of an employer who commits a crime. We can consider cases of frauds committed by two or more persons. In a case, that a fraud committed by employees who are ordered by his or her employer or by both of them, the punishment in this case is stated in the Section 263 (3)<sup>521</sup>. The punishment is heavier than for the

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<sup>520</sup> Livshiz, T., "Choosing between Saw and Scalpel: Fcpa Reform and the Compliance Defense," Columbia Journal of Law & Social Problems, .

<sup>521</sup> German Criminal Code, Section 263(3).

In especially serious cases the punishment shall be imprisonment from six months to ten years. An especially serious case exists, as a rule, if the perpetrator:

1. acts professionally or as a member of a gang which has combined for the continued commission of falsification of documents or fraud;
2. causes an asset loss of great magnitude or by the continued commission of fraud acts with the intent of placing a large number of human beings in danger of loss of assets;
3. places another person in financial need;
4. abuses his powers or his position as a public official; or

normal fraud. If a group of criminal commits fraud, then they will be imprisoned for at least five years or penalized under the Section 263<sup>522</sup>. They will be imprisoned for six months to one year, if they use their authority to commit the fraud or their employers authorized them to do so. After, considering problems caused by actions of committees, companies, partnerships, managers, shareholders, and juristic persons; it is found that German Laws do not heavily punish the employers who are the juristic person.

To be clearly understand regarding the law of the employment, the definitions of employer, employee, and the employment contract are the words should be well-understand. “Employer” refers to a person who agrees to employ and pay for a person(s).

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5. feigns an insured event after he or another have, to this end, set fire to a thing of significant value or destroyed it, in whole or in part, through the setting of a fire or caused the sinking or wrecking of a ship.

<sup>522</sup> German Criminal Code, Section 263

(1) Whoever, with the intent of obtaining for himself or a third person an unlawful material benefit, damages the assets of another, by provoking or affirming a mistake by pretending that false facts exist or by distorting or suppressing true facts, shall be punished with imprisonment for not more than five years or a fine.

(2) An attempt shall be punishable.

(3) In especially serious cases the punishment shall be imprisonment from six months to ten years. An especially serious case exists, as a rule, if the perpetrator:

1. acts professionally or as a member of a gang which has combined for the continued commission of falsification of documents or fraud;
2. causes an asset loss of great magnitude or by the continued commission of fraud acts with the intent of placing a large number of human beings in danger of loss of assets;
3. places another person in financial need;
4. abuses his powers or his position as a public official; or
5. feigns an insured event after he or another have, to this end, set fire to a thing of significant value or destroyed it, in whole or in part, through the setting of a fire or caused the sinking or wrecking of a ship.

(4) Section 243 subsection (2), as well as Sections 247 and 248a shall apply accordingly.

(5) Whoever professionally commits fraud as a member of a gang, which has combined for the continued commission of crimes under Sections 263 to 264 or 267 to 269, shall be punished with imprisonment from one year to ten years, in less serious cases with imprisonment from six months to five years.

(6) The court may order supervision of conduct (Section 68 subsection (1)).

(7) Sections 43a, 73d shall be applicable if the perpetrator acted as a member of a gang which has combined for the continued commission of crimes under Sections 263 to 264 or 267 to 269 Section 73d shall also apply if the offender acts on a commercial basis.

“Employee” refers to 1) a person who is authorized to do a job for his or her employer, 2) a representative of a juristic person, or 3) a contractor who has his or her own employee(s) and is not a recruitment agency. Therefore, it can consider the definitions for some legal terms as follows. According to the above definitions, there are 4 types of employers.<sup>523</sup>

Firstly, the real employer refers to a person who agrees to employ a person to do a job and pay for the person. The real employer can be an individual or a juristic person.

Secondly, the representative of employer refers to a person (e.g. managing director) who is authorized by a juristic person.

Thirdly, the assigned employer refers to a person who is assigned by the real or the representative of employer to take an action(s).

Fourthly, the contractor employee refers to a person who is a contractor with his or her own employee(s). That is the service employment refers to the case that an entrepreneur does not want to employ a person(s) by itself and it make an agreement with a person to (1) responsible for its business(es) and recruitments. Or (2) employ a person(s) to conduct the business(es) with the mutually agreed rate(s) of wage(s).

Beside, “Employee” refers to a person who agrees to do a job for his or her employer. This does not include housekeeper. Other components (e.g. normal working hours, overtime, holidays, leaves, wages and welfares) of labor protection laws must be reviewed.<sup>524</sup>

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<sup>523</sup> Beale, S. S., "A Response to the Critics of Corporate Criminal Liability," American Criminal Law Review.

<sup>524</sup> Pop, I.A. (2006).

Finally, the employment contract refers to a contract with two parties: employer and employee. The employment is effective when the contract is made. The contract can be in written or spoken forms. A person who is called as an employee agrees to do a job for the other person who is called as an employer. The employer agrees to pay for the employee during the employment period.

### 3.4.1 Debate on Corporate Criminal Liability

The Con-supporter never agrees with the criminal offence and provides the debate namely (1) The juristic person has no deliberation of the criminal offence (2) Only the individual person is served for the penalty (3) Scope of authorization or objectives of the juristic person and (4) No penalty for the fictitious juristic person.

#### 3.4.1.1 Juristic Person has no deliberation of a criminal offence

The concept considers the mentality of individual person is the master. The doing or not doing; no matter you like it or not, by law is driven by personal mind which is in a form of expression. It is not suggested to put a penalty against someone if there is no element concerning with human's mind. Even though, the criminal law is invented to prevent people from causing damage of one's society with a mechanical control of any persons obeying by the public measures, so called "All sorts of penalty", it is essential if the punishment is put against the really bad person.<sup>525</sup> Cavanagh (2011) explains it is stated that the deliberation of the criminal offence against the wrongdoer is rational and in respond to the principle of criminal law. The perpetration broadly is consisted of deliberation plus the principle of criminal offence associated with the corporate personality describing that the mechanical control of the performance of the juristic person who really acts is deserved to be punished. The Pros argued that, the performance of the juristic person is not representing all level of the standard performance.<sup>526</sup>

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<sup>525</sup> Dubber, M. D., "Comparative History and Theory of Corporate Criminal Liability," New Criminal Law Review.

However, it is more practical in the Trial Court when the Judge does not intend to consider this concept but usually adjudicate the case traditionally. The criminal offence against the juristic person is likely to apply implementation of the Civil Code on an offence of the infringement in combination. To make matter of the worst, the court is not keen to make a distinction between the two.

#### 3.4.1.2 Corporal punishment against in the Individual Person

It is arguable in that a criminal punishment is solely involved with an individual person. When the performance of the corporate representative is considered as it is by the juristic person, the fine measure against the juristic person may oppose to the criminal offence since it may effect on the shareholder's responsibility which is again is not related to crimes. In fact, it is hard for the shareholders to control any performance achieved by members.

Naturally, the shareholders of any corporate firms engage to know any assigned performance by the corporate representative or employee. When the law against the criminal intent or accessory performed by the individual person, the ignorance of the shareholders should not involve with that criminal intent resulting in certain degree of punishment. The Corporate Law provides the term of management under the committee appointed or withdrawn by the shareholders in the general meeting in compliance with the French Criminal Code, Article 121-2 to 121-7 respectively<sup>527</sup>. In the United States, the appointment of the firm committee presently concerns with proxy system rather than the meeting of the shareholders in person due to huge numbers from interstate investors across the country. In global system, the appointment of the committee by the shareholders becomes reduced in practice provided that the practice

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<sup>526</sup> Cavanagh, N., "Corporate Criminal Liability: An Assessment of the Models of Fault.," Journal of Criminal Law.

<sup>527</sup> See Footnote No. 442 and 443.

turns into the hand of the executive or the legalized group who is nominated for the corporate committee.<sup>528</sup>

It is suggested that the fictitious person, so called the juristic person. It created by law may be affected by the result of fine measure but also effect on the asset or property. In consequence, the responsibility of the shareholders is unavoidable. The adjudication by the court against the innocent shareholders who may not involve with any criminal offence are contradictory to the rule of law. It is the law which the criminal offence is designed for any individual person who is proven guilty. Besides, the domino effect becomes the responsibility of the juristic person on a fine payment penalty, who pushes the burden toward the consumer at last. Therefore, it can say that, the penalty putting against the juristic person is not ideal and is unjustified.<sup>529</sup> Alternatively, it may be effective by law if the conspiracies of the shareholders or the executives are reliable that shall be convinced or supported the illegal performance which is corresponding to “*Ultra Vires*” based on two motives, namely, to prevent the shareholders who abuse the funds from lost profits and to guarantee the security of fund controls.<sup>530</sup> Without the two things, it is supportive evidence if the others in the corporate firm is not put punishment against it shall not influence on the performance.<sup>531</sup>

#### 3.4.1.3 Scope of authorization or objectives of the Juristic Person

It is arguable that the criminal offence against the juristic person is not applicable. In general practice, the activity of the juristic person as the corporate firm concerns with the registration system and its objectives, of which they are impossible

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<sup>528</sup> Esakov, G. A., "Corporate Criminal Liability: A Comparative Review," City University of Hong Kong Law Review.

<sup>529</sup> *Ibid.*

<sup>530</sup> Cavanagh, N., "Corporate Criminal Liability: An Assessment of the Models of Fault.," Journal of Criminal Law.

<sup>531</sup> Farrell, N., "Attributing Criminal Liability to Corporate Actors," Journal of International Criminal Justice.

to deal with a criminal offence. The objectives written by the juristic person are also considered as scope of its authorization by laws. It is assumed that the juristic person should never perform crime. In some states in the United States, the sampled objectives of relative laws were allowed to write broadly, for example the Delaware Corporation and Business Entity Laws, Section 102 (a) (3), (1967) provided that “The nature of the business or purpose to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;” Somehow, the scope of the corporate objectives is too broader to enable ones to perform as “*Ultra Vires*.” The result of penalty against the criminal juristic person remains in the pipelines, but not limited to the given objectives.<sup>532</sup>

#### 3.4.1.4 No penalty for the Fictitious Juristic Person

Under the Penal Code, Section 18, the degree in punishment includes the execution, imprisonment, confinement, fine and forfeiture of property. The execution and imprisonment is impossible to apply for the criminal offence of the juristic person. Consequently, this limited degree prevents it from the penalty. The Judiciary System provides the legal punishment against the juristic person in an implementation of the fine and forfeiture of property, for example. The relative laws may be applied to both imprisonment and fine, to which the fine measure is applied instead of the imprisonment. The ultimate measure of punishment against the juristic person is determined as either execution or imprisonment in the first degree. Should the juristic person be deprived of the measures? The gradient measures may be applied from the first degree to both fine or imprisonment against the juristic person remains

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<sup>532</sup> The Delaware Corporation and Business Entity Laws, Section 102 (a) (3), (1967).

arguable. The lower degree applying a fine measure against the juristic person and even the ordinary person is discriminated. The debates remain unsettled from this ground.<sup>533</sup>

### 3.4.2 Component of the Criminal Action per consideration on based ground under the Foreign countries

The application of the criminal offence against the criminal intent of the corporate representative under the Civil Law System associated with the Criminal Law System by France Court is not responsive by adjudications due to offences committed by negligence with no intent. Based on this, Should the juristic person be able to commit the criminal offence against the negligent ground? It is suggested that the negligence by law is not the criminal intent as much as it is not an application of the criminal intent caused by the corporate representative against the criminal intent of the juristic person in the more precise method.<sup>534</sup>

In the United States, the discussion of the offences committed by the negligence has remained in the court cases of *State of Russia v. Lehigh Valley R. Co.*, 90 N.J.I., 312 (1917)<sup>535</sup> of which the adjudication reviewed that it was an offence of manslaughter while *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 88 N.E. 22 (1909)<sup>536</sup> and *Commonwealth V. Illinois Cent. R.R.*, 152 Ky. 320, 153 S.W. 459. (1913), *Ann Cas 1915B*

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<sup>533</sup> J.M. Heminway, "Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability," *Stetson Law Review.*, 41(1) (2011): 21-40.

<sup>534</sup> A.S. Kircher, "Corporate Criminal Liability Versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability," *American Criminal Law Review.*, 46(1) (2009): 157-178.

<sup>535</sup> *State of Russia v. Lehigh Valley R. Co.* (1917). Russian Government against the Railroad Company to recover for the loss of munitions destroyed by fire and explosion while in the possession of the defendant. The loss occurred in 1916. The United States recognized Bakhmetieff as ambassador from Russia in 1917. This was commenced under authority from Bakhmetieff in July 1918, after the overthrow of the Government which he represented by unrecognized Soviet regime.

<sup>536</sup> *People v. Rochester Ry. and Light Co.* (1909). Concerned a man slaughter indictment obtained after the "grossly improper" installation of gas devices in a home resulted in the occupant's death. Although the court dismissed the indictment, it did so only because the statute defined homicide as "the killing of one human being...by another," thus manifesting legislative intent to exclude corporate entities.

617<sup>537</sup>, it was not under the manslaughter which is considered as only the execution by the individual person, not related to the juristic person since the definition of manslaughter meaning the killing of one human being by another. In the British Court case of *P & O European Ferries (Dover) Ltd. (1991) 93 Cr. App. R. 72 iv.*<sup>538</sup>, it was not the criminal penalty against the juristic person. Even though, the manslaughter ground could be applied against the juristic person.<sup>539</sup>

### 3.4.3 The Punishment measure against the Juristic Person under the Foreign Laws

The Controversial issue about the criminal offence against the juristic person should have been under consideration between the legislative and the judiciary. When considering the will of the legislative in parallel to the Civil Legal System, it is noted that both sides have not been compromised with each other.

The responsibility of the juristic person requires the definition of the existing status of it. The legal method and the legal perspective are useful to a solution to the problems of the Civil Law instead of the concept of the Common Law. Whatever, the result of the court case is against the criminal offence of the juristic person, the idea of the Civil Law is only an application of the court to adjudicate the case and interpret the provision for the proceeding in the court. In addition, the court is not allowed to seek

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<sup>537</sup> Commonwealth V. Illinois Cent. R.R. (1913). At that time Kentucky courts defined manslaughter by common law as "the killing of one person by another person. " The court noted that there was statutory authority for including corporations within the definition of "person" but that "the word 'another' can only mean another member of the same class as the slayer, and a corporation, though a 'person' in law, is but an artificial person, and therefore not of the class to which the person slain belongs.

<sup>538</sup> *P & O European Ferries (Dover) Ltd. (1991)*. The prosecution of P&O European Ferries (Dover) Limited, formerly Townsend Thoresen, and five individuals for corporate manslaughter. Despite the clear failings within the company, the prosecution failed as Mr. Justice Turner directed the jury not to convict ((1991) 93 Cr App R 72 (Central Criminal Court)). In order to convict the company of manslaughter under the identification principle that applied at the time, one of the individual defendants who could be "identified" with the company as its "controlling mind" would have had to have been guilty of manslaughter, per Denning LJ, affirmed by the House of Lords in (*Tesco Supermarkets Ltd v. Natrass (1972) AC 153*). As this was not the case, the company could not be found guilty.

<sup>539</sup> Brickey, F. K., "Corporate Criminal Accountability: A Brief History and an Observation," Washington University Law Review.

the validity of law in the factual case. The court applied the criminal offence against the offender who is really a criminal actor. The adjudication of most court always applies the concept of *Alter Ego* which is a supports of the Common Law System. The application may have a result of the case based on performance of which both the juristic person and the corporate representative have in common and both should be given the punishment by law. The legal method on this concept may not be applied properly since it is not under the Civil Law. It is evident that the court has modified its application which is not under the Criminal Law for enforcement.<sup>540</sup>

Besides, Beale (2009) explains<sup>541</sup> the concept of *Alter Ego* has created by the Common Law Judiciary Court for an application of the punishment measure against the offensive juristic person by law. The concept is the essential part of applying in the law of Britain since the juristic person as the fictitious person is unable to have the criminal intent which it requires performance and deliberation of the corporate representative in relation with the juristic person's. It is an effort to co-existing beings of the corporate representative and the juristic person to be more precise.

However, the concept of *Alter Ego* has not been known when it is applied for Thailand's Legal System. In the fundamental law of the Civil Code, the relationship between the corporate representative and the juristic person are supported by a certain law applying the concept of the Corporate Representative's Performance and Deliberation against an actor and even oneself since any actions are engaged by individual person who really acts against the civil offence.<sup>542</sup> The principle of the Civil and Commercial Code providing the term of the corporate representative is not based

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<sup>540</sup> Harlow, J. W., "Corporate Criminal Liability for Homicide: A Statutory Framework," Duke Law Journal, .

<sup>541</sup> Beale, S.S. (2009).

<sup>542</sup> V. Nanda, "Corporate Criminal Liability in the United States: Is a New Approach Warranted," American Journal of Comparative Law Supplement, 58 (2010): 605-630.

on the concept of *Alter Ego* that related to the Criminal Law. It is suggested that the doctrine of *Alter Ego* is not properly applicable in supports of the Criminal Law for the adjudication of the criminal offence against the juristic person.<sup>543</sup>

Technically, the Criminal Law requires the penalty measure in the more specific way and it is strictly applied accordingly by laws; literately described by “*Odia Restrigenda*” meaning that the punishment measure against any persons who act in such the way of criminal terms used by law is prohibited. In doing this, a more specific law related to the criminal offence against the individual person who really acts is required. Again, the application of any general relative laws or a search of will of the legislative is inhibited. The extensive term of law applied for the criminal offence against any persons who act deliberately crimes related to the juristic person without the supportive laws for that certain action may cause no compromise with the principle of the Criminal Law.<sup>544</sup> The controversy requires amendment by the state government which usually demands the application of the relative laws against the criminal offence and a degree of punishment measure in more specific ways. Basically, the primary method is the way to indicate the role of the juristic person, including show how it is related to the particular criminal offence against the juristic person in a proper practice by relative laws. The effective measure of a degree of punishment is also thoughtfully applied against the juristic person as the offender under the international practice by laws.<sup>545</sup>

Therefore, consider the legal method which is ideally used to find the solution to the legal controversy is provided in the followings;

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<sup>543</sup> Baer, M. H., "Organizational Liability and the Tension between Corporate and Criminal Law," Journal of Law and Policy.

<sup>544</sup> Esakov, G. A., "Corporate Criminal Liability: A Comparative Review," City University of Hong Kong Law Review.

<sup>545</sup> Ibid.

Firstly, the more specific criminal offences against the criminal juristic person in particular is required without the Penal Code, Section 18. The amendment of this specific law related to the certain criminal ground is suggested by;<sup>546</sup>

- (1) The additional provision under the Criminal Law according to Section 18 which is a specific law against the juristic person. It is also in awareness of “The existence of the criminal offence in any particular law against the juristic person is provided”. Since, the misinterpretation of the law may be a mistake for applying the particular-based criminal offence to compromise with all general criminal offences under the Penal Code of other relative laws.
- (2) The additional provision under the Criminal Law in term of a degree of punishment measure is required, for example the Penalty Act, B.E. 2499 (1956) on the registered and corporate partnerships, limited company, association and foundation.
- (3) The relative laws for the individual criminal offences against the juristic person in particular are required, which the alternatives of (1) or (2) above.

Secondly, the legal term “Juristic Person” which requires taxonomy may be homonymous to all juristic persons by mistake if it is a private or public corporation; ministry, office, department, for example. The administrative offices as the juristic person may be charged with the criminal ground. On the other hand, the government office may be penalized by the fine measure that it wastes when being considered as an offence against itself while the criminal punishment is applied against the individual actor who causes loss or damage of the public.<sup>547</sup>

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<sup>546</sup> See Footnote No. 160.

<sup>547</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " [American Criminal Law Review](#), .

Therefore, it is important that the legislative should find the settled laws which are categorized into types of more specific criminal offence in particular relative laws. The integrated knowledge concerned with the principles of laws related to degree of punishment measure associate with the recognition of the socially contemporary problems are thoughtfully considered and determined under the practicality of applicable law through all means in more specific ways.

### 3.5 Conclusion

In the past, the criminal punishments were used in order to prevent wrongful actions. Accordingly, the western countries referred to these punishments while making treaties with the other countries that prevented the country to gain judicial independence.

The context discussed depicts the Common Law-based states viewing on alternating concept of most criminal offences against the juristic person in practicality, even though it is not applied to all criminal offences. The criminal offence against the juristic person tends to become most practical. However, the controversial issue of the traditional idea; No juristic person does crime, remains especially in the Civil Law-based countries which always view on the theory of law of deliberation of crime and the scope of the juristic person in authorization. It can note that, the complicate issue to decide of which each law-based country is more advantageous. Practically, it is a consideration of both Pros and Cons counterparts viewing on the supporting evidences of criminal offence against the juristic person and supporting evidences of no criminal offence against the juristic person.

It is important point, even though the Civil Court stands out clear to put a criminal sentence against the juristic person, the Judge has never applied to use a theory of Vicarious Liability or Respondent Superior while the criminal offence is usually performed by the juristic person, a theory of *Alter Ego* which reviews that the performance of the corporate representative is the performance of the juristic person because the deliberation of the corporate representative is like from the deliberation of

the juristic person which is compliance with the Civil Code on the purpose of the juristic person always expresses via the corporate representative.

Amid both Pros and Cons on the criminal offence against the juristic person may not be dissolved due to the compromising concept of “The juristic person is artificial being”. Meanwhile, the offence is widely practical in the Judiciary System of Common and Civil Law Systems. It is supportive that the performance of the juristic person is actually a reflection from the corporate representative’s. It assumes that the juristic person who is put the criminal offence is Vice Versa as if the performance of the corporate representative. This should bring out the theory of law which provides idea of given penalty. Besides, the application falls into the “vicarious liability” which is based associated with the primary liability.

The vicarious liability defines as it is responsibility upon the performance achieved by the others; here is the corporate agent or employee due to the line of command in the corporation. The criminal offence occurs since the executives or employers may not have a sufficient control. It can say that what criminal offence against the juristic person is applied. It is based on the concept of the existence of the juristic person and the criminal intent by the legal sense. The supporting evidences depend greatly on the corporate representative as mind, intention, performance, authorization and even assignment on behalf of the juristic person. This concept provides elements regarding on the intention and the performance of the corporate representative as if the intention and the performance of the juristic person. To be more precise, the concept considers the juristic person as if the mental and existing being.

Moreover, the drawback of the vicarious liability concerning with responsibility of the juristic person on the criminal ground committed by the other without more specific position creates relatively assumption of the person with intention and performance who represents the juristic person. It is suggested to review the drawback for practical application since the mind and the existing being of the juristic person are

settled up; the contrary concept can be lifted off. Regarding the primary liability which is from the concept of *Alter Ego-based* concerns ideally, whoever who has power to control the juristic person is the same as the juristic person. Therefore, the performance of the executive who can monitor the juristic person. In generally, when the performance of the juristic person is charged with the criminal offence whether it is the criminal intent, the juristic person should be put against the penalty because this is the *Alter Ego-based* discipline.

The primary liability is as well partly rational but the debates remain controversial. First, when the performance of the juristic person is brought over, the authorized person who is executive may not always be the performer. On the contrary, in fact the executive who usually runs the company does not always perform the real work since the activity depends largely on the line of command; the subordinates. If the application of the concept is very strict on that, it is not properly applied to the criminal offence of the juristic person. When the subordinates who act back and forth in respond to the executive is considered as the act and the intention of the juristic person, the vicarious liability becomes in the pipeline. Both concepts discussed are the mean of how we try to differentiate the performance between the ordinary person and the juristic person.

This issue has been discussed for quite a long time, the actions must be taken by the legal representatives within their scope of authority in order to meet the objectives and provide the benefits. Therefore, the juristic person could be punished. Hence, in the case that the juristic person commits an offense, the court can utilize laws which relate to the punishment of the juristic person under laws indication by only fining the juristic person. As compared to the natural person who commits the same offense, the natural person must be imprisoned and fined. This leads to unfairness that is contrary to the principle of “The equality before the law”. Moreover, in cases that laws stated the natural person may receive criminal punishments by using the term of “Person”. By comparing the liability of the employers who are the juristic person found

that the other countries seriously consider the intention of the juristic person. Even though, a juristic person does not physically exist. The juristic person can take a wrongful action through its representative or any person who does voluntarily its duty.

Upon the debates of both concepts between the Pros and Cons, the globalization of the economic importance is indicated the necessity of the juristic person who shall be responsible for the performance which may cause to loss of the individual person or even the public in general. The fundamental idea relies mainly on the status of the juristic person. To begin with, the theory of law is basically discussed in order to the practical concept of criminal offence can be applied or at least be the measures for the legalized engagement of the juristic person in term of value consideration for a certain action which is in favor of the society. In the case, that loss caused by partly performance of the juristic person, the property of it shall be estimated for some compensation as for regain the loss in particular.

Meanwhile, the Criminal Code which is required to exclude the criminal offence; the undesirable act or illegal activities and the punishments against the juristic person from the common criminal grounds are directly applied. The ideal is the criminal offence with the proper punishment which may be related to fine measure and forfeiture of property shall not be only the Civil Code.

## CHAPTER 4

### ANALYSIS OF CORPORATE CRIMINAL LIABILITY

#### 4.1 The Analysis of the Law regarding to Corporate Criminal Liability

Base on the study from legal critics, adjudications and even the Civil Law based-countries like Japan, Germany, and France, and the Common Law based-countries like the United States of America and the United Kingdom. The juristic person's liability under Thai Civil and Commercial Code Section 76, para 1 is brought into its fundamental concept. The Common Law-based UK has applied the Code Section 76 against the juristic person liability in term of the primary liability, rather than the vicarious liability which is provided commonly in Section 425 on the employer's liabilities for the employee's actions or in Section 427 on the principal's liabilities for the juristic person representatives. The principle features the main theme in that one's liability for other's actions involves with the juristic person as the employer and actor at the same time describing that the juristic person's liability as same as the ordinary person whose liability of his own. In fact, the juristic person is artificial being. Hence, the performance of the juristic person representative and authorized person are brought into accounted if it is liability by law. The author has brought the provision of Thai Commercial and Civil Code Section 76 into consideration of supporting evidence for the primary liability.

#### 4.2 The Analysis of Specific Provisions for Corporate Criminal Liability

Being considered on this issue, the hypothesis of the author aims to the practicality when compared with the Civil and Commercial Code, Section 76 on types of the established juristic person. Moreover, when the actions of the juristic person's representative and the authorized person are cause damage to other parties. It requires only an application of Section 76 or any relative law in particular. However, the provisions that can be used for the Corporate Criminal Liability can be explained as follows;

#### 4.2.1 The application of Section 76

The application of Section 76 is allowed to be implemented throughly in term of the juristic person's liability of the civil offences against the juristic person or the public corporation (Section 76 is able to adapt for ruling the liability issues of the juristic person of all types whether it will be private or public juristic persons).

The common Section 76 under Thai Civil and Commercial Code provides the legal practice for all juristic person liabilities but not limited to ones' establishment of private law or public law. It includes the jurist's criticism. This practice involves the application of Section 76 which is similar to both the Civil Code of Japan Article 44 and the German Civil Code Section 31. The Foreign Civil Law based- countries as well as the concept of the Organic Theory have been fundamental in the common original drafts of Thai Civil Law Section 76.

#### 4.2.2 Types of the established Juristic Person under the Liability for Wrongful Acts of Officials, B.E.2539 (1996)<sup>548</sup>

Due to the common views on an application of Section 76 for the civil offence of the juristic person's liability for all types. It is suggested that the liability under the particular law is required to bring into accounts and when the disputable case involves with the juristic person's liability for any damage of others, the application of Section 76 is more practical. Considering on the particular liability by law, Thai liability for the Wrongful Acts of Officials, B.E. 2539 (1996) has been provided in supports since problems caused by the government official upon damage of others may require its application. The provision in Section 5 states that "The government units are liable for any damage caused by the officials' actions but not directly include the officials."

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<sup>548</sup> See Online, "Thai Language Version, <<http://www.lawreform.go.th/lawreform/images/th/legis/th/act/2539/A468-20-9999-Update.pdf>>."

When the Public Corporation's liability is brought into accounts, it is suggested that if the consideration of the Public Corporation as "The government offices" and the actors as "Government officials" require for its interpretation under the liability for the Wrongful Acts of Officials, B.E. 2539 (1996) and even the actions cover its definition under this law. When the complete elements mentioned are found, the Public Corporation's liability is always under the law supported more particular way. No element mentioned above involves, the application of Section 76 may require for the Public Corporation's liability in common way.

Consider the definition of the juristic person's representative or the authorized officer on behalf of the juristic person, the author has suggested from hypothesis on the criteria in order to consider if (1) The juristic person is liable for the juristic person representative's actions of which "The juristic person's representative" is defined and the criteria of involvement with the juristic person as in a status "The juristic person's representative" is like. The terms may include several representatives in one or in a group of persons and if (2) The juristic person is liable for the authorized officer's actions on behalf of the juristic person of which "the authorized officer's actions on behalf of the juristic person" is defined and even how much the relationship toward a status "authorized officer's actions on behalf of the juristic person" is like.<sup>549</sup>

#### 4.2.3 The actions that the corporation must be punished by the law

The criminal actions that the corporation must be judged or punished by the law can be analyzed as follows;

##### 4.2.3.1 The original Japan Civil Code, Article 44<sup>550</sup> as Thai draft Section 76

As Thai draft Section 76 provides the juristic person's liabilities for the person's actions upon damage on others. The juristic person's liability includes

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<sup>549</sup> See Footnote No. 71.

<sup>550</sup> Japanese Civil Code, Article 44

managers (directors) or other a representatives; temporarily appointed directors (Article56)<sup>551</sup>, provisional juristic person's representatives (Article57) <sup>552</sup> or any authorized person for special purpose by the directors to execute some actions on behalf of the juristic person according to the Civil Code Article 55 of Japan which provides power of the directors to give other persons some authorization but not include the actions of employees; labors, supervisors and the company drivers. Questions rose how the 2 terms, "The juristic person's representative" or "The authorized person on behalf of the juristic person" is defined.<sup>553</sup>

#### 4.2.3.1.1 The Juristic Person's Representative in term of Section 70

In term of Section 70, the term is always defined as the person's authority upon actions as if performance of the juristic person as organ or members of it under the law, regulation or the written instrument of engaged authority on behalf of the juristic person especially, inflicting damage upon others. Most of the establishment

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(1) A juridical person shall be liable for damage caused to others by its directors or other agents during the course of the performance of their duties.

(2) If any damages are inflicted to others due to any ultra vires act beyond the scope of the purpose(s) of the applicable judicial person, the member(s) and director(s) who consented to the Resolution pertaining to such act ant the director(s) or other agent(s) who executed such resolution shall be jointly and severally liable for such damages.

<sup>551</sup> Japanese Civil Code, Article 56

In cases there is any vacancy in the office of directors, if any damage is likely to occur due to the delay in the business, the court must, at the request of any interested person or a public prosecutor, appoint a provisional director.

<sup>552</sup> Japanese Civil Code, Article 57

A director shall have no authority of representation as to any matter involving a conflict of interest between the juridical person and such director.

In such case, the court must, at the request of any interested person or a public prosecutor, appoint a special agent.

<sup>553</sup> Japanese Civil Code, Article 55

A director may delegate his/her authority on a specific act to other person(s) only in cases such delegation is not prohibited by the applicable articles of incorporation, act of endowment, or resolution of the general meeting of the members.

law usually provides a status of persons in levels of authority which concerns with most actions or assignment toward other parties despite its unsettled term of use.

In addition, the juristic person's representative under the law in a single organic is commonly considered as a single person as the individual of juristic person's representative who can make a decision and his or her intention on any performances. The performance is always as of the juristic person representative's of that organic. Samples are a manager of the ordinary registration partnership as the juristic person's representative of the ordinary registration partnership.

When the regulation or the written instrument is requiring on multiple numbers of the juristic person's representatives namely company directors, partnership managers, the juristic person's manager of the Condos, the performance acted by those members is considered by an application of Section 71<sup>554</sup> describing that the majority vote is concerned, except the requirement by law state other things. Otherwise, it is not considered as the juristic person representative's performance but rather than relative status; the juristic person's representative by a term of a straw man or representative by Estoppel (The term is assumed to be the officials' authority as the authorized person on behalf of the juristic person but it is considered by criteria if further described as it is "The authorized officer on behalf of the juristic person").

In the case, the law provides the positions of the juristic person's representatives in the corporations or bodies of persons consisting several members in them, that is, a board of commission in the foundation related to other parties (The Civil and Commercial Code Section 87)<sup>555</sup>, a board of commission as a representative of the foundation related to other parties (The Civil and Commercial Code Section 123)<sup>556</sup>, a

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<sup>554</sup> Thailand Civil and Commercial Code, Section 71 In the case where a juristic person has several representatives, if it is not otherwise provided by the law, or defined in regulations or constitutive act, decisions as to the affairs of juristic person are made by a majority of representatives.

<sup>555</sup> Thailand Civil and Commercial Code, Section 87 An association is represented in its relations with third persons by its committee.

board of commission of the co-operatives as an operator as well as a representative related to other parties.

(The Cooperatives Act, B.E. 2542 (1999), Section 51)<sup>557</sup> and a board of directors of the Government Housing Bank (Government Housing Bank Act, B.E. 2496 (1953), Section 19).<sup>558</sup> The performance of the legal groups can be considered as the juristic person representative when the actions are under the authorization by law describing as either the decision making on any activities or intention depends largely on the meeting resolution.

However, the 3 factors require; First, it is recommended by law if component members of those are compliance with the laws. Second, if numbers of members attending in the meeting are required by law and only if none is recommended by law. The general practice can be preceded by numbers of attendants in the meeting should be half of the total numbers of members and Third, if the meeting resolution from vote is recommended by law counting by the majority vote. In fact, the majority vote by law can considered as common the majority vote (Half vote counts out of the total numbers of the attendants), the extra vote counts (The two-third or three-fourth of the attendants) or unanimous vote counts (Complete vote counts). Fail to this practice by law on either factor may nullify any performances of the juristic person's representative but rather the other status involves as "The authorized person on behalf of the juristic person."

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<sup>556</sup> Thailand Civil and Commercial Code, Section 123 A foundation is represented in its relations with third persons by its committee.

<sup>557</sup> The Cooperatives Act, B.E. 2542 (1999), Section 51 The board of directors shall carry on the affairs of the cooperative and represent it in matters concerning the third persons. For this purpose, the board may entrust one or several board members or the manager of the cooperative to act on its behalf.

<sup>558</sup> Government Housing Bank Act, B.E. 2496 (1953), Section 19 The Board shall be the Bank's representative in business dealings with outside parties. Nevertheless, the Board may assign such duties to the Executive Board or the Manager.

#### 4.2.3.1.2 The Juristic Person as temporarily appointed or provisional Juristic Person Representative under Section 73 or Section 75<sup>559</sup>

Sometimes, the vacancy of the authorized person who operates the juristic person is evident and valid by law Section 70 in any circumstances; death or resignation, and no supports by law or regulation or even the written instrument recommends the substitute as a provisional representative, the Civil and Commercial Code Section 73 provides duty of members of stakeholders plead claim upon the case to the court for the issuance of appointed the juristic person representative as a provisional representative. Hence, the course of duration of the position is the legally effective by the court order per a service time till the termination of the service is complete. The author considers the provisional juristic person representative by the court order as the juristic person representative by Section 76. The similar case is applied by the Civil and Commercial Code Section 75 when the stakeholders submit the case of representative. The court order the provisional representative can perform something under the law since no juristic person representative is in a position or in lack of vote counts. Thus, it is also considered under Section 76.

#### 4.2.3.1.3 The Authorized Person for general matters or a more specific issues assigned by the Representative as the Juristic Person's Representative

The previous discussion is based on the same principle of the Civil Code Article 55 of Japan providing the directors can authorize the other for any activities but only if it is not prohibited by the regulation, the written instrument of establishment or the shareholders' meeting resolution. When Thai Law can means any authorized person for general matters or a more specific issues as the juristic person representative whose authority is under his or her own decision and on behalf of the juristic person but not any person who acts under the decision making of the actor.

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<sup>559</sup> See Footnote No. 126 and 131.

Under the present law, it permits the representative who can authorize any person or a body of person to act on behalf of the juristic person representative and the authorized person or body of person is considered as the juristic person representative under Section 70 including Section 76.

It can say that, when no relative law provides that the juristic person representative can authorize any persons or a body of persons to perform as the juristic person representative. In fact, when the registration of the established juristic person is preceded, the regulation allows the juristic person representative can authorize any persons or a body of persons to perform any activities. The author agrees to this point since the performance of the representative related to other parties requires actions under the law. Meanwhile, the regulation to be followed. It is noted that the regulation for the juristic person is nothing but the rationale in describing authorization on any actions of the representative. When the regulation allows the representative who can transfer his or her authority of actions to any person or a body of person, those given authorization is considered as the juristic person representative under Section 76.

Similarly, when the juristic person representative authorizes the juristic person agent to act any activities. The agent always performs a scope of officers' authority but without making any decision or act more independently per issue. The authorized juristic person agent for general matters is always restricted by law Section 801<sup>560</sup> as mentioned earlier. Sampled brought from the case that a board of commission of the foundation assigned one of commission to sell ticket for the Bowling Charity Competition in order to gain more funds for his or her foundation. The author considers this manner of assigned person as the juristic person agent, not as the juristic person representative under Section 76.

In summary, questions are brought into if the performance acted by the juristic person representative described above is as of the juristic person who

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<sup>560</sup> See Footnote No. 134.

shall be liable under Section 76. Evidences from the jurists and the adjudications are led to the same that the performance of “The juristic person representative” is always as of the juristic person’s liability under Section 76. We need to discuss if the performance of an actor that cause any damage to others is as of the juristic person representative. It is suggested that the manner should be considered as the juristic person representative under Section 70 providing the organ or members of the juristic person which is established by law, regulation or written instrument is legally engaged with the juristic person. Especially, the actions against the others as many as the temporarily appointed representative under Section 73, the provisional juristic person representative under Section 75 and any person or a body of person who is authorized as the representative by law, regulation or written instrument which allows the representative authorize any person to act some activities. All hypotheses are responding to the Civil Code, Article 44 of Japan (associated with Article 55) and the German Civil Code, Section 31 including the adjudication of the Supreme Court about the case between Lennard’s case [*Lennard’s Carrying Co., Ltd v Asiatic Petroleum Co., Ltd. (1915)*] and *HL Bolton (Engineering) Co., Ltd. v. TJ Graham & Sons Ltd. (1956)*.

#### 4.2.4 Critical evaluation the Corporate Criminal Liability that can be supported Criminal Liability in Thailand

According to, the study on tort liability of the juristic person pursuant to Civil and Commercial Code of Thailand, the finding indicated several aspects of the application problem for tort liability of the juristic person that have still been existent. In the study of this chapter, the problems both in part of the problem in the application scope of tort liability of the juristic person pursuant to Civil and Commercial Code and the problem in litigation for tort liability of the juristic person in Thailand have been analyzed. The legislation of the juristic person’s liability as well as the nature of tort liability of juristic person in abroad which has been studied in Chapter 2 will be applied for analysis and comparison with tort liability of the juristic person pursuant to Civil and Commercial Code of Thailand which has been studied in Chapter 3 for analysis on problems that have still been doubts causing the application guideline for tort liability of the juristic person pursuant to Civil and Commercial Code of Thailand.

#### 4.2.4.1 Problem for application scope of tort liability of Juristic Person pursuant to Civil and Commercial Code

It has been currently accepted on tort liability of the juristic person that the juristic person is liable for tort. However, from the study on the application scope of tort liability of the juristic person, the finding indicated several problems in applying tort liability of the juristic person according to general principle and the nature of tort. In thesis study in this chapter, the problem has been analyzed on which law should be applied for tort liability of the juristic person between the juristic person liability in the event that the juristic person's representative or authorized officer on behalf of the juristic person causes damage pursuant to Section 76 which is the legislation in the general part; or in the event of legislation pursuant to Civil and Commercial Code, Part 2 for nature of tort which is the specific legislation in tort; or the legislation of both natures should be applied altogether.

In addition, in the event of the application for juristic person's liability under the event that the juristic person's representative or authorized officer on behalf of juristic person causes damage pursuant to Section 76, the nature of liability for juristic person's liability is applied for the event that regards the juristic person as the self-offender or the juristic person is involved in liability for incurred damage.

Moreover, the problem will also be studied and analyzed that if it appears which the juristic person's employee performs his or her duty and then causing third party damaged, the application for tort liability of the juristic person in such event shall be conducted pursuant to Civil and Commercial Code in Section 76, or it should be the event of the employer's liability pursuant to the legislation in the nature of tort based on Section 425. The problem will be further analyzed whether the legislation in Section 76, the end of Paragraph 1 about the exercise of right of recourse when reimbursing the damage indemnity to others from the act of the juristic person's representative or authorized officer on behalf of the juristic person can be applied based on this section in exercise of right of recourse for indemnity from damage maker who may be the juristic person's representative or authorized officer on behalf of the juristic person. In problem analysis in the study of this chapter, the academic opinion and the

way of petition judgment will be taken for analysis and comparison on such occurred problems. The problems taken for analysis can be classified for consideration as follows.

#### 4.2.4.2 Juristic Person's liability should be the Liability pursuant to legislation in general part or liability in tort nature

The application problem and scope of tort liability of the juristic person in this aspect has been the thing that should be considered on which nature of legislation should be applied for law application in the event that the juristic person shall be liable in damage of others in the tort liability. The application of legislation should be conducted based on Section 76 which is the legislation in general part, or specific legislation in tort nature, or legislation based on Section 76 which is the legislation in general part in accompany with legislation in tort nature. In addition, next aspect should be considered whether the application of juristic person's liability nature in the event of damage occurred from the act of the juristic person's representative or authorized officer on behalf of the juristic person or in the event of damage occurred from which nature of act of the juristic person's employee. It was to say that it is the nature of act that shall be liable by the juristic person for its own act or it is not regarded as the act that shall be liable by the juristic person for its own act but it is the event that the juristic person shall be jointly liable in the damage occurred from the act of such person.

Therefore, the consideration has been taken on which types of laws should be applied for liability caused from the act of person in both events. The juristic person's liability should be applied pursuant to legislation in general part and tort nature.

From the consideration on the state of the juristic person based on Civil and Commercial Code of Thailand, the finding indicated that the juristic person is lifeless and it may not express wish or intention by itself. Therefore, the representative is required to be the person who expresses wish or intention in lieu of the juristic person. The legislation pursuant to Civil and Commercial Code in Section 76, Paragraph 1 is enacted for the event of the juristic person's liability that it is caused from the dutiful act of which person. However, it is not enacted the dutiful act of the juristic person's

representative or authorized person on behalf of the juristic person that causes damage of the juristic person's representative is the juristic act or tort or any other acts.

Hence, in consideration on tort liability of the juristic person, the act of the juristic person's representative or authorized officer on behalf of the juristic person based on Section 76, Paragraph 1 has been considered whether such dutiful act is the tortious act that is complete with liability element pursuant to legislation of tort nature. If the act of such the juristic person's representative or the authorized officer on behalf of the juristic person is done with complete element pursuant to legislation in tort nature, this makes the juristic person continually involved in liability for occurred damage based on tort liability of the juristic person.

#### 4.2.4.3 Liability based on Section 76 is not the specific legislation of tort liability of Juristic Person

In consideration on tort liability of the juristic person, the cause required for consideration on applying the legislation based on the legislation in general part in accompany with tort nature has been due to the consideration on legislation in part of the juristic person's liability. The finding indicated that pursuant to Civil and Commercial Code in Section 76, Paragraph 1 which is the legislation in general part, it is enacted that "If the dutiful act of the juristic person's representative or authorized officer on behalf of the juristic person is the cause of damage incidence to others, the juristic person shall be liable for indemnity reimbursement for that damage. However, the right of recourse is not lost but it is exercised with the damage maker."

From consideration on the juristic person's liability in damage occurred to others from the act of the juristic person's representative or authorized officer on behalf of the juristic person pursuant to Civil and Commercial Code in Section 76, Paragraph 1, the finding indicated the juristic person's liability in such section is not the specific legislation in the event of tort liability of the juristic person but it is the event of the juristic person's liability in tort and juristic act issues.

Adjunct Kowilaikoon described that "When considering on the words in Section 76, Paragraph 1, it cannot make a final decision that Section 76, Paragraph 1, will be specifically applied in tort issue or any contracts. However, as the

word of “indemnity” has broad meaning such as breach of contract based on Section 380, Paragraph 2 which is enacted that “If the creditor has right to claim indemnity for default...” and in the event of tort based on the end of Section 420 which was enacted that “...the tort-feasor shall be liable for indemnity reimbursement for that act.” Therefore, he made the opinion under Section 76, Paragraph 1 is enforced both for breach of contract and tort.” Moreover, Kittisak Prokkati explained that “The dutiful act of the juristic person’s representative which is the cause of juristic person’s liability that can be the juristic act of debt settlement, tort or act of any other facts.”

So, the juristic person’s liability in damage occurred with others from the act of the juristic person’s representative or authorized officer on behalf of the juristic person pursuant to Civil and Commercial Code in Section 76, Paragraph 1, shall be considered whether damage occurred from dutiful performance of the juristic person’s representative or authorized officer on behalf of the juristic person is the damage derived from breach of contract or derived from tortious act. Therefore, it is necessary for taking legislation and element in that issue to support in consideration.

#### 4.2.4.4 Element of tort liability of Juristic Person in damage occurred from the act of the Juristic Person’s Representative or Authorized Officer on behalf of the Juristic Person

From the consideration on the juristic person’s liability in the event that the damage occurred from the act of the juristic person’s representative or authorized officer on behalf of the juristic person pursuant to Civil and Commercial Code based on Section 76, Paragraph 1, the tort liability of the juristic person cannot be considered applying such legislation for just single section in judging tort liability of juristic person. However, the legal element based on Section 76, Paragraph 1 in accompany with element of liability based on tort law shall be considered. If considering on Section 76, Paragraph 1, the element can be classified for consideration as follows: cause 1) the juristic person’s representative or authorized officer on behalf of the juristic person, 2) dutiful act, 3) damage occurred to others. The consequence is that juristic person shall be liable for indemnity reimbursement.

The part of tort liability pursuant to Civil and Commercial Code in Section 420 is enacted that “Anyone intends or neglects and illegally do harm to others until dying or to body or health or freedom or any property or right, it was said that the person acts for tort and needs to reimburse the indemnity for that act.”

When considering based on Section 420, the elements can be classified as follows: cause including 1) anyone, 2) acts by conscience, 3) that act is the act by willfulness or by negligence, 4) that act is the illegal act, 5) that act causes damage to absolute right of other person, 6) relationship between act and occurred damage, and the damage occurred with others, and the consequence is the person shall reimburse the indemnity.

From the consideration on legislation of both sections in consideration on tort liability of the juristic person in the act of the juristic person’s representative or authorized officer on behalf of the juristic person, the criteria of juristic person’s liability can be considered as follows.

Element 1. The tortious act of the juristic person’s representative or authorized officer on behalf of the juristic person is completes in element based on Section 420. It was to say as follows.

1.1 Act by conscience of the juristic person’s representative or authorized officer on behalf of the juristic person.

1.2 Act of the juristic person’s representative or authorized officer on behalf of that juristic person is the act by willfulness or negligence.

1.3 Act of the juristic person’s representative or authorized officer on behalf of that juristic person is the illegal act.

1.4 Act of the juristic person’s representative or authorized officer on behalf of that juristic person causes damage to the absolute right of other person.

1.5 Relationship between the act of the juristic person’s representative or authorized officer on behalf of that juristic person, and it occurred damage.

Element 2. Tortious act of the juristic person's representative or authorized officer on behalf of the juristic person based on point 1 is the act within the operation based on the outline of the juristic person's objective determined in constitution.

According to the consideration in part of the juristic person, it was deemed that the juristic person can do any acts like the natural person and the juristic person may have the same right and duty as the natural person unless some rights that are supposed to have particularly for the natural person only. In tort issue, the juristic person can also cause damage to others through the act of the juristic person's representative or authorized officer on behalf of the juristic person.

Thus, in applying tort liability of the juristic person in the event of damage occurred from the act of the juristic person's representative or authorized officer on behalf of the juristic person, the legislation pursuant to Civil and Commercial Code in Section 76 which is the legislation based on general principle that is enacted in part of juristic person's liability in damage from dutiful act of the juristic person's representative or authorized officer on behalf of the juristic person should be applied for consideration in accompany with legislation in tort nature based on Section 420.

However, in some events, the finding indicated that the court has judged for juristic person's liability pursuant to legislation in direct tort nature without applying the juristic person's liability pursuant to legislation in general part. Such opinion was appeared pursuant to the Supreme Court's Judgment No. 893/2521 whereas the Supreme Court judged that "according to Civil and Commercial Code in Section 69 (now, it has been Section 66), it is enacted that "Juristic Person can have right and duty in conformity to all legislations of law within the scope of its object as determined in regulation or constitution." According to Section 70 (now, it has been Section 67), it is enacted that "within the enforcement for the provision of previous section, the juristic person can have right and duty like the natural person unless the natural right and duty that are only supposed to have and to be particularly for the natural person." Under Section 420 is enacted that "anyone intends or neglects, illegally do harm to others until dying ... to property or right... it is said that the person is the tort-feasor and shall reimburse the indemnity for that act." Pursuant to such legislation, it is regarded that the

juristic person can act for tort to others within its objective. Thus, the plaintiff sued the defendant which is the juristic person with construction contracting objective as stipulated in articles of incorporation or constitution for its tortious act to the plaintiff and liability for indemnity reimbursement to the plaintiff whereas the plaintiff was unnecessary to state in the plaint that the manager or other representatives of the defendant that is the juristic person acts for tort to the plaintiff again.

According to the decision of the Supreme Court, when the plaintiff did not state the plaint that the manager or other representatives of the defendant act for tort to the plaintiff, it was unnecessary for the defendant to be liable pursuant to Civil and Commercial Code of Section 76. The Supreme Court deemed that the legislation of Section 76 is the matter that the juristic person's manager or other representatives are dutiful, causing damage to others and the juristic person shall be liable to pay indemnity to that damage. If the juristic person's manager or other representatives act out of the scope of the juristic person's objective, the juristic person does not be liable for indemnity payment for that damage. It was the different issue with the defendant that is the juristic person and acts for tort to others pursuant to legislation of Section 69 and Section 70 as aforesaid. Then, the plaintiff can sue the defendant which is the juristic person for its tortious act toward the plaintiff to be liable for damage reimbursement to the plaintiff.

The Supreme Court's Judgment in such case can classify the consideration on tort liability of the juristic person into 2 following aspects.

Event 1 It is the event that the juristic person has tort liability pursuant to Civil and Commercial Code in Section 76 in accompany with Section 420 which is the event that the manager or other representatives (the juristic person's representative or authorized officer on behalf of the juristic person) of the juristic person are dutiful and then causing damage to others. Therefore, the juristic person shall be liable to pay indemnity for that damage; and

Event 2 It is the event of the juristic person's tortious act toward others without the act of the juristic person's representative or authorized officer on behalf of the juristic

person based on legislation of Section 69 and Section 70. The tort liability based on Section 420 is directly applied.

However, if well considering on the fact from such Supreme Court's Judgment, the finding indicated the judgment of such case by the Supreme Court to be the event that the juristic person is the tort-feasor by itself without passing through the act of the juristic person's representative or authorized officer on behalf of the juristic person based on legislation of Civil and Commercial Code in Section 69 (now, it has been Section 66) and according to Section 70 (now, it has been Section 67). With high respect, the author disagreed with the way that the court judged such aspect to be the event of direct tortious act by the juristic person without the act of the juristic person's representative due to the consideration on fact in such case and it was appeared the Metropolitan Waterworks Authority, the plaintiff, sued the United Constructor Company Limited, the defendant, to be liable for damage occurred from the defendant's construction contracting of road in connection between Pinklao bridge and Charan Sanit Wong Road. The tort was acted by the defendant toward the plaintiff by damaging water supply pipe of the plaintiff as the result of the use of automobiles and machineries in overlaying by construction and hitting water supply pipe by soil excavation. The fact was appeared the plaintiff attested that the defendant's employee or worker has been the tort-feasor. The Supreme Court judged that such adduction has not been the adduction out of the charge. It was deemed that in such case, the fact was appeared that in fact, there has been still the tortious act occurred from the defendant's employee. The judging way of the Supreme Court for such case may be for justice usefulness in the case since the plaintiff sued the defendant which is the juristic person without averment that the tortious act of that juristic person has been the act of any person in the juristic person. The court sentenced by considering on the remedy principle of indemnity reimbursement to the victim from the juristic person's tortious act. This has been the significant spirit of tort law.

Tingsaphat wrote the note at the end of such Supreme Court's Judgment that "The Supreme Court referred to Civil and Commercial Code in Section 76 that it is right for the legislation for liability of the defendant since the juristic person

is immaterial and cannot do anything by itself but it is liable within the objective. The Supreme Court referred to Section 69, 70 (now, they have been Section 66, 67) and it was also right by the way that the juristic person is liable when the juristic person's representative pursuant to Section 76 is dutiful inside the scope of the juristic person's objective based on Section 69, 70. It was not out of the charge.”

However, the finding from the consideration on the way of petition judgment in various cases described that there have been still judgments in various cases being judged by the court that the juristic person shall be liable for tort from its own act by applying particularly legislation in tort nature without considering that it is caused from the act of the juristic person's representative or authorized officer on behalf of the juristic person as the liability based on Section 76, Paragraph 1. For example, the event that was judged by the Supreme Court which the juristic person is liable for tort in its act based on Civil and Commercial Code in Section 420 as appeared in the Supreme Court's Judgment No. 608/2521, Section 421 as appeared in the Supreme Court's Judgment No. 321/2526 and 28/2534, Section 422 as appeared in the Supreme Court's Judgment No. 7973-7975/2548, Section 428 as appeared in the Supreme Court's Judgment No. 390/2550, or the event judged by the court that the juristic person shall be liable for tort in damage occurred from the property under the consideration that the juristic person is liable in such act without appearance for the act of the juristic person's representative or authorized officer on behalf of the juristic personsuch as pursuant to Civil and Commercial Code in Section 436 as appeared based on the Supreme Court's Judgment No. 5782/2541, and Section 437 as appeared based on the Supreme Court's Judgment No. 7973-7975/2548, etc.

#### 4.2.4.5 Application of the nature of Juristic Person's

##### Liability

The finding from the application for the nature of juristic person's liability indicated the existent aspect that should be taken for clear analysis on the application guideline of tort liability of the juristic person whether which nature of law should be applied in the event of damage caused from the act of the juristic person's representative or authorized officer on behalf of the juristic person; or in the event of

damage caused from the act of the juristic person's employee. It was to say that in the event of damage occurred from the act of the juristic person's representative or authorized officer on behalf of the juristic person. It is the event that should apply the law for the legislation in general part based on Section 76, Paragraph 1 in accompany with legislation in tort nature. When the law in such nature is applied, the nature of juristic person's liability is the liability being regarded as the act that is liable by the juristic person in its act or regarded as the event that the juristic person shall be jointly liable in damage occurred from the act of such person.

Moreover, the aspect that must be further considered on the event of damage occurred from the act of the juristic person's employee is whether the application for tort liability of the juristic person should be done in the same nature as the event of the juristic person's representative or authorized officer on behalf of the juristic person, or which nature of law should be applied and how the nature of juristic person's liability in this event should be.

#### 4.2.4.6 In the event of Juristic Person's Liability from the act of the Juristic Person's Representative or Authorized Officer on behalf of the Juristic Person

For the consideration aspect of the application problem for tort liability of the juristic person in this aspect. Nowadays, as it found that the court judgment has applied tort liability of the juristic person in the event of damage caused from the act of the juristic person's representative or authorized officer on behalf of the juristic person pursuant to Civil and Commercial Code in Section 76, Paragraph 1, for both natures. It was to say that there has been both the event that is regarded the liability based on Section 76, Paragraph 1 is the tort liability of the juristic person from its act by judging the juristic person shall enter to be liable for the act of the juristic person's representative or authorized officer on behalf of the juristic person under the consideration that it is the act of the juristic person itself. In some events, it was found that the court judged for joint liability with the act of the juristic person's representative or authorized officer on behalf of the juristic person based on Section 76, Paragraph 1 that has been regarded as tort liability in the act of others. In addition, the academic

opinion as well as foreign law which are the origin of such legislation should be taken for analysis for application benefit of tort liability of the juristic person in such aspect.

**A.) Academic opinion**-There have been 2 guidelines of academic opinions related to the consideration in this aspect. It was to say that the opinion of the first party (Acharn Anumat Jaisamut, Acharn Jeed Setthabutr, and Mr. Sahat Singhawiriya, Adjunct Kowilaikoon, Acharn Kittisak Prokkati, Associate Sanankorn Sotthiphan, Mr. Somphopphisit Sukphisit) was that the nature of the juristic person's liability based on this section is the liability of self-act. The act of the representative or authorized officer on behalf that performs his or her duty within the scope of juristic person's objective or authority has been similarly considered to be equal to the self-act of the juristic person. If the juristic person's representative acts in the name and within the frame of the juristic person's objective, that the representative will not be others but it is the juristic person itself. If the representative does for tort, it is the same as self-act of the juristic person. The person who shall be liable for its tort is the juristic person.

While, the opinion of the other party (Sanongchart) deemed the juristic person shall be liable, if and only if the juristic person's representative or authorized officer on behalf of the juristic person is the tort-feasor to others, and the consequence of that tort is caused from dutiful act of the juristic person's representative or authorized officer on behalf of the juristic person. Even though, Section 76 is not enacted for the tortious act in dutiful act that the juristic person's representative or authorized officer on behalf of the juristic person shall be liable, the juristic person's representative or authorized officer on behalf of the juristic person shall also be liable since he or she is the tort-feasor to others based on Section 420, and the juristic person shall be liable based on Section 76 and jointly liable based on Section 291 since everyone shall absolutely pay for debt. The victim will sue the juristic person or the juristic person's representative or the authorized officer on behalf of the juristic person for joint liability or can sue anyone for the liability up to the selection as it is the right of the victim which is the creditor for joint debt collection from debtor.

**B.) Way of court judgment**—From the study petition judgment in this aspect, the finding indicated that such aspect has been judged into 2 guidelines for the way of court judgments including the group of judgments that have considered the joint liability of the juristic person on the act of the juristic person's representative which is regarded as the act of juristic person, and the other guideline has been the group of judgments that have judged for joint liability of the juristic person with the act of the juristic person's representative or authorized officer on behalf of the juristic person.

The first group of court judgments have been assumed that the juristic person shall be liable for the act of that juristic person's representative which is regarded as the act of that juristic person such as the event based on Petition Judgment No. 5129/2546 that was judged by the court which “the first defendant taught physical education subject of the school and this was the public service performance on behalf of the representative of Department of General Education which is the second defendant. The command for the student to run around the field for body warming and the student punishment for running around the field was also considered as the public service performance. When such public service performance of the first defendant caused the death of Master Por., Department of General Education which is the second defendant shall be responsible for indemnity reimbursement for damage to the plaintiff who is the mother pursuant to Civil and Commercial Code in Section 76, Paragraph 1.” In addition, there have been the judgments sentenced by the same taken.

Another way has been the group of judgments that were judged for joint liability of the juristic person with the act of the juristic person's representative or authorized officer on behalf of the juristic person. The opinion was the nature of tort liability of the juristic person from the act of the juristic person's representative or authorized officer on behalf of the juristic person pursuant to Section 76 is the joint liability nature. There have been judgments in several cases that were judged in such guideline such as Petition Judgment No. 21/2540 that was judged by the court “When the second defendant who is the Chief Inspector, and the third defendant who is the inquiry official did not properly maintain the disputed car which is the property in

dispute, causing the loss of disputed car. Then, this event was the tortious act on behalf of performance as the representative of Royal Thai Police Department which is the first defendant and the juristic person pursuant to Civil and Commercial Code in Section 76, Paragraph 1. Royal Thai Police Department which is the first defendant shall be jointly liable with the second defendant and the third defendant for reimbursement of damage indemnity to the plaintiff. They cannot claim that they have had none of the authority in confiscating the article in criminal case for denial of its own liability” Moreover, there have been the judgments sentenced by the same taken.

**C.) Way of consideration on foreign law**—From the consideration on the nature of juristic person’s liability based on the nations that have applied jurisprudence of Civil Law both of Japan and German, the finding indicated that both nations have adhered Organic Theory by regarding that it is just the law for affirming the living condition of the juristic person. It has been in line with Organic Theory. When considering on the state of juristic person, it means the personality of the person who expresses the wish of that juristic person, saying that it is the juristic person’s representative itself. Pursuant to Japan Civil Code in Section 44 which is the outline of Civil and Commercial Code of Thailand in Section 76 which is enacted in Section 44, Paragraph 1 that “Juristic Person shall be liable for damage as the result of the act of the manager (director) or other representatives in his or her or their dutiful acts.”

From the study on the nature of tort liability of the juristic person pursuant to Japan Civil Code in Section 44, the finding indicated that pursuant to Japan law, the company director is regarded as the representative or the same part of the company that cannot be separated. The act of the director in the name of subsidiary can be regarded as the company act. The nature of juristic person’s liability is the juristic person’s liability for its own act by regarding that the act of the manager (director) or the juristic person’s representative is the act of juristic person and the juristic person shall be liable in that act like self-act. However, it shall be the act of the manager (director) or other representatives of the juristic person such as temporary director, the

juristic person's specific representative or the person authorized from the director in acting on behalf of the juristic person's representative pursuant to Japan Civil Code in Section 55 only.

Pursuant to German Civil Code in Section 31, it is enacted that "Association is the juristic person that shall be liable for damage occurred with the third party. If it is the act of the board, director or other representatives appointed by the association that causes damage from assigned business operation." The jurisprudence of German Civil has applied Organic Theory in the juristic person's liability. Thus, the juristic person shall be liable for the act of the juristic person's representative by regarding that, it is also the act of juristic person.

Moreover, in consideration on the juristic person's liability in the nations applying the jurisprudence of Common Law both England and United States of America, the finding indicated that previously, there was no legislation for the juristic person to be liable for its own act both England and United States of America. The event of joint liability by the juristic person in the act of others was particularly found. However, later, the court in England judged the event of tort liability of the juristic person by applying Organic Theory in expression of the juristic person's intention for judgment on the problem of juristic person's liability subject to the liability that it is caused from its own act.

In the case of Lennard's Case (*Lennard's Carrying Co., Ltd., v. Asiatic Petroleum Co., Ltd. (1915)*) and the case of *Daimler Co., Ltd v. Continental type and rubber company (Great Britian) Ltd. (1916)*, they were regarded as the act of the individuals who are the company's organ such as directors or managers in acting within the scope of the authority only. Therefore, it was considered to be the act of the company. Both cases have always been the norm of tort liability of the juristic person and also the beginning point in applying Organic Theory in judgment of criminal liability of the juristic person. Supreme Court of Florida in the United States of America had also sentenced and set the norm about tort liability of the juristic person. It was regarded that the act of managing agent of the juristic person within the scope of the

juristic person's objective shall be liable by the juristic person in such damage under the consideration that the act of such managing agent is the direct liability of the juristic person by Corporate Direct liability Theory as appeared in the case of *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla.1985), and *Winn-Dixie Stores, Inc. v. Robinson*, 42 So.2d 722 (Fla.1985), and *Charles P. Schropp, Petitioner, v. Crown Eurocars, Inc.*, 654 So.2d 1158 (Fla.1995).

#### 4.2.4.7 In the event of the Juristic Person's Liability from the act of the Juristic Person's Employee

The application problem of tort liability of the juristic person has been another problem. In the event that if it appears which the juristic person's employee performs dutiful function and then causing third part damaged, the application for the nature of tort liability of the juristic person in such event shall be conducted based on Civil and Commercial Code in Section 76, Paragraph 1 or should be the event of the employer's liability based on the legislation in tort nature based on Section 425. However, as liability of both sections are the different nature of liability. It was to say that the nature of liability based on Civil and Commercial Code in Section 76, Paragraph 1 is the liability for self-act while the nature of liability based on Section 425 is the liability in damage from the act of others.

**A.) Academic opinion** - Pursuant to Civil and Commercial Code in Section 76, it was enacted that "If the dutiful act of the juristic person's representative or the authorized officer on behalf of the juristic person is the cause of damage incidence to others that the juristic person shall be liable for indemnity reimbursement of that damage. However, the right of recourse to the damage maker is not lost." It was found that the act liable by the juristic person is the act occurred from the juristic person's representative or the authorized officer on behalf of the juristic person.

According to the suggestion on amendment of Civil and Commercial Code, Part 1 of the Office of the Council of State. It has described the drafting of this section by explaining the word of "The juristic person's representative or authorized officer on behalf of the juristic person" under the aspect in meaning

consideration for the word of “The juristic person’s representative” that the act of the juristic person’s representative based on this Section 76 which shall be liable by the juristic person for indemnity reimbursement to the victim has the meaning particularly for the representative based on the bill of Section 70 only, or also including the acting person on behalf of the other juristic person because the acting person on behalf of the other juristic person is regarded as the employee or the proxy of the juristic person. The specific legislation has been available for the employer or the principal for liability on indemnity reimbursement.

Thus, the committee considered whether it is necessary for re-legislation for the event of acting person on behalf of the juristic person and finally deemed that Section 76 means the juristic person’s representative based on the bill of Section 70 and also the acting person on behalf of the other juristic person since it has been too narrow to be meant specifically for the representative based on the bill of Section 70. The acting person on behalf of the juristic person may not just be meant for the event of the employee or the proxy only. It may be other events such as at present, government officer has not been regarded as the employee of the administrative agency but when government officer does the tort, the administrative agency shall be liable for damage reimbursement based on this Section 76 on behalf of government officer who is the representative of the administrative agency since he or she is the person in authority according to law, rule and regulation in performing official duties. If considering based on the consideration aspect of the committee on suggestion for amendment of Civil and Commercial Code, Part 1 in such section, it was deemed that the event, the authorized officer on behalf of the juristic person acts for tort may be also considered to be the event that the employee acts for tort.

However, in this event, Adjunct Kowilaikoon described that in the event of the juristic person’s employee, if acting for tort to the person in employment, Section 425 is applied for the enforcement.

**B.) Way of Supreme Court’s Judgment-** In the event appearing that the employee acts of tort, the finding from the study on the court judgment indicated that most of the way of the court judgments have been judged or the juristic person’s

liability by joint liability of the juristic person on the employee's act of tort pursuant to Section 425. It was appeared for both in the event of the litigation by the plaintiff to the employee who acts for tort and the juristic person who is the employer in order to be the co-defendants, etc.; or the event of the litigation by the plaintiff to the juristic person for joint liability in the employee's act of tort without suing the employee who also acts for tort. The court has also judged the juristic person's liability pursuant to Section 425 same as C.

There has ever been the Supreme Court's Judgment No. 768/2521 that judged for joint liability of the juristic person for the employee's act of tort by applying pursuant to Section 76. The fact in such case was appeared that the first defendant who has been the employee of the company which is the third defendant, and had the duty in controlling wood transportation truck. Despite, the third defendant has already known that the plaintiff is the disputed truck owner but it returned to notify for request of police force to track and confiscate such disputed truck in order to just require debt still owed by the plaintiff's brother with the company which is the third defendant. The court judged that the act of the first defendant has been the illegal act and it has been the cause of damage to the plaintiff. It has been considered as tort to the plaintiff under the requirement for liability on damage occurred from that act. When the first defendant who has been the employee of the third defendant acted for tort to the plaintiff during performing his duty for the benefit of the company which is the third defendant, then the third defendant shall be liable for the damage occurred from the consequence of tort incurred by the first defendant on the behalf of the juristic person's proxy pursuant to Civil and Commercial Code in Section 76.

**C.) Way of consideration of foreign law-** According to the consideration on the application aspect for tort liability of the juristic person in the event that the juristic person's employee acts of tort, the finding indicated that pursuant to Japan Civil Code in Section 44 which is the origin of the legislation in Section 76 is enacted that "Juristic Person shall be liable for damage as the result of the act of the manager (director) or other representatives in performing his or her or their own duties."

Pursuant to Japan law, it describes tort liability of the juristic person in the event of the act of the manager (director) and other representatives. It is explanation that the juristic person is liable in damage particularly the event that causes damage to others by the act of the manager or other representatives (such as temporary manager, special representative or the authorized person from the representative to act some types of activities pursuant to Section 55) and by expression of their duties (pursuant to Section 44, Paragraph 1), and not by the illegal act of the employee such as worker, mechanic, or machinery driver, etc. This is meant that for damages occurred from others, the juristic person's representatives shall enter to be liable for all damages caused by the representatives (the persons who shall be liable for damage from their acts). However, the available mutual agreement between the internal relationship between the juristic person and the representative shall be considered in this amended law.

From such legislation, it will be deemed that pursuant to Section 44 of Japan Civil Code which is the origin of Section 76 of Civil and Commercial Code of Thailand, the damage from the employee's act of tort is not applied pursuant to such section. Japan Civil Code also constitutes the legislation in part of the employer's liability for the employee's act of tort pursuant to Section 715 which is also the specific legislation like Civil and Commercial Code of Thailand in Section 425.

Right of recourse of the juristic person from the cause maker- Pursuant to legislation in Section 76, Paragraph 1 at the end, it is enacted about the exercise of the juristic person's right of recourse when the damage indemnity is reimbursed to others. It is enacted that "...but does not lose the right of recourse to the damage maker." It was appeared that the legislation in the exercise of such right of recourse has been different from the original legislation prior-amendment of such words. This change will result in whether the right of recourse can be exercised by the juristic person. Nowadays, after the juristic person's reimbursement of indemnity, it can the recourse with the damage maker who is the juristic person's representative or authorized officer on behalf of the juristic person be currently made.

Amendment of legislation in part for exercise of right of recourse- Originally, before amendment of Civil and Commercial Code, Part 1 in 1992 in part for exercise of right of recourse pursuant to Section 76, Paragraph 1 at the end, it has been enacted that “but has right of recourse with the person who is efficient cause of damage later”. However, after that, the amendment of legislation about the exercise of right of recourse for the new juristic person is enacted that “but does not lose the right of recourse with the troublemaker. The Committee of Amendment Consideration on Civil and Commercial Code described about the amendment of such words that as the right of recourse pursuant to this section is not the event of new right creation, the ability of the juristic person’s recourse with the damage maker depends on different natures of substantive law such as breach of contract or on behalf of the employee, employer or the proxy principal. The right of recourse does not occur pursuant to this section. Thus, it was amended to be “But does not lose the right of recourse...” in order to be truly identical with the meaning.

From legislation about the exercise of right of recourse pursuant to Section 76, Paragraph 1 at the end which has been amended, the exercise of right of recourse with the cause maker has been originally changed and it has been adhered all the time that the juristic person can exercise the right of course pursuant to this section. However, when such legislation has been amended, the right of course has been changed. Then, under Section 76 has not been the legislation for granting the right of course. However, in the event whether the recourse can be done or not shall be in line with the nature of substantive law in each issue afterward.

#### 4.2.4.8 Exercise of right of recourse pursuant to Section 76 in the academic opinion and the way of court judgment

The law for exercise of right of recourse by the juristic person after indemnity reimbursement to others pursuant to Section 76 has been originally enacted that “but has right to recourse the person who is the cause of damage later.” The academic opinion in such event and the way of court judgment in the same way after that the juristic person’s reimbursement of damage indemnity, it can have right to

recourse the manager or other representatives who is the troublemaker according to its right pursuant to Section 76, Paragraph 1. Later, it was appeared that when the word in the law of such section has been amended to be “but does not lose the right of recourse with the person who causes damage.” Due to such event, the right of course of the juristic person has been changed. It was to say that the juristic person does not have right of recourse according to this section.

However, if the juristic person has right of recourse or not, it should be in line with the nature of substantive law in each issue. Adjunct Kowilaikul, and Sanongchart (2013) had the similar opinions after that the juristic person’s reimbursement of indemnity, it can have right to recourse from the juristic person’s representative or authorized person on behalf of the juristic person. However, it may be the event of fault in its duty function such as by negligence, it is not performing its duty with reasonable ground or not using special skill as it should be done.

Acharn Kittisak Prokkati had the general opinion that the act based on the authority of the juristic person’s representative is regarded as the self-act of the juristic person. Therefore, the act may not be regarded as the personal act of the juristic person’s representative and the juristic person’s representative shall not be responsible or bear the expense of that act.

Nevertheless, there may be several events that the representative’s act is the act with personal nature or it is regarded that the representative should be personally liable to the juristic person in the act in term of internal relationship between the juristic person and the juristic person’s representative. In these events, they should be in line with the proxy principle. For example, the juristic person’s representative causes damage to the juristic person due to negligence of the representative or the acting representative without authority or out of the authority as the cause for damage of the juristic person.

Thus, the representative shall be liable for the damage reimbursement to juristic person (Section 812). Sanongchart (2011) had the opinion that in this event, Civil and Commercial Code in Section 77 applies *mutatus mutandis*. The

legislation of proxy for enforcement on the relation between the juristic person and the juristic person's representative, and between the juristic person or the juristic person's representative and the third party. The representative of the juristic person that causes any damage as enacted in Section 812 shall be liable to the juristic person like the liability of the proxy to the principal. Thus, the juristic person has already reimbursed the indemnity for damage to the victim, it can have right to recourse the juristic person's representative who causes damage. For the authorized officer on behalf of the juristic person, even though Section 77 is not enacted, According to Section 4 for the legislation on proxy shall be also applied *mutatus mutandis* for enforcement. Thus, the juristic person can exercise the right of recourse in this event. At present, the finding indicated that the way of court judgment takes place in the way that the juristic person can exercise right of recourse pursuant to Section 76 after reimbursement of indemnity for damage.

While, the another academic opinion of Associate Sanankorn Sotthiphan who deemed that in the event after the indemnity reimbursement by the juristic person. The right of recourse from the juristic person's representative or authorized officer on behalf of the juristic person should not be available since the act of the juristic person's representative or authorized officer on behalf of the juristic person that operates in the frame of the objective is self-act of the juristic person. It may be improper to exercise its right of recourse because it is usually often the recourse used with the event that someone acts for tort and the other is stipulated by law for joint liability. In the event of self-tort liability, the right of recourse has not been found.

Moreover, the amended legal words should be considered whether the recourse of juristic person with the person who causes damage can be done shall be in line with different natures of substantive laws such as breach of contract; or on behalf of the employer, the employee or the principal, the proxy, the right of recourse derived from this section shall not be exercised. When considering on Section 77 that the law stipulates the enforcement *mutatus mutandis* for the legislation of Proxy Law of this code, it must be applied as much as it can. He deemed that Section 427 should not be enforced with the proxy since the proxy is not the representative because the

representative is not the other person but it is the juristic person itself. Furthermore, the legislation of Section 427 is the exceptional statute, then it should be strictly applied without deference for application. He also considered on congruity if the juristic person can exercise right of recourse, the juristic person is unnecessary to be liable for anyone after indemnification, the recourse will be made to the representative. This always must be the execution of the juristic person and it is improper. However, the ways of judgment of the Supreme Court that judged according to the academic opinion in this way have not been discovered from the study.

#### 4.2.4.9 Way of consideration on foreign law

From the law consideration according to the legislation of Civil Code of Japan in Section 44, the finding indicated in case that the juristic person shall reimburse the indemnity for damage caused with others by the manager and other representatives in performing their own duties. Pursuant to Civil Law of Japan, there has not been legislation that grants the right to juristic person in exercise of right of recourse for damage incurred from the act of the manager and other representatives as stipulated by Civil and Commercial Code of Thailand in Section 76.

In addition, in part of the legislation for tort liability in German Law in Section 31, it is enacted that the association which is the juristic person shall be liable for incurred damage with the third party. If it is the act of the committee, committee member or other representatives being appointed from the association that causes damage from the business operation as assigned, it was not found that pursuant to the Code of German law. The association which is the juristic person is granted to enable to exercise the right of recourse from the committee, committee member or other representatives being appointed from the association when the association has already reimbursed indemnity. This is the same nature as Civil Law of Japan.

The matter that should be considered in Civil Law System of Japan and German has been as follows: both countries have applied Organic Theory in the juristic person as well as liability of the juristic person through the adherence on the act of the juristic person's representative as the act of the juristic person by itself. Therefore, the law of both countries does not the exercise right of the juristic person in

exercising the right of recourse for incurred damage from the act of the juristic person's representative on incurred damage.

#### 4.2.4.10 Litigation problem for tort liability of the Juristic Person in Thailand

It was discovered from litigating the juristic person at present that the misunderstanding problem of the victim from tort act of the juristic person in litigation has still been existent. However, the juristic person is lifeless, so the act of juristic person shall be considered from the juristic person's representative or the authorized person who acts on behalf of the juristic person.

Thus, for how the litigation to the juristic person will be, which nature of case in litigation the juristic person should be, and how the matters of law in litigation that the victim from the tort act of the juristic person should be considered for benefit in litigation for tort liability of the juristic person will be, the instances according to the court's way of judgment judged in such aspect for benefit of the victim from the juristic person's tort will be studied for the review on application problem for liability of the juristic person pursuant to Civil and Commercial Law of Thailand in this part. The resulting in litigation ability to properly and reasonably demand indemnity in damage remedy pursuant to spirit of tort law afterward. Considering the nature of case in litigation for tort liability of the juristic person, the application problem for tort liability of the juristic person in litigation in this part has been the finding discovered that it caused from misunderstanding of the litigant who did not understand on how litigation the juristic person for tort liability shall be. It shall be sue the juristic person and the juristic person's representative or solely sue the juristic person. The finding indicated both in the events of litigation the juristic person for liability from his or her own act or liability from other people's acts.

However, in tort liability of the juristic person from its own act, as the juristic person is lifeless. Therefore, the operation of the juristic person shall be operated by the juristic person's representative. In the event that the juristic person's representative acts for tort in performing its duty within the scope of the juristic persons' objective, such event is regarded as its own act of the juristic person whereas

the juristic person shall be liable for tort pursuant to Section 76 in supplementing to Section 420. In litigation, the purpose is makes the juristic person enter to be liable for reimbursement of damage in such tort act. In fact, there was the instance appearing that the victim from tort act of the juristic person did not know which the juristic person's representative or authorized person who acts on behalf of the juristic person acted for tort. Therefore, the doubt has been available in such event, how the case in litigation the juristic person shall be set for the litigation and the juristic person can be solely sued or not. Thus, the following aspects should be considered.

#### 4.2.4.11 In the event of overt act of the Juristic Person's Representative or Authorized Officer on behalf of the Juristic Person

As the operation of the juristic person shall be operated by the juristic person's representative and in the event that the juristic person's representative or authorized officer on behalf of the juristic person acts for tort in perform his or her duty within the scope of the juristic person's objective, such event has been considered to be the own act of the juristic person whereas the juristic person shall be liable for tort. In case, it is manifest which the tort act of the juristic person is caused from the act of any juristic person's representative or authorized officer on behalf of the juristic person. The victim from tort act of the juristic person should sue the juristic person to litigate tort liability with the juristic person by suing the juristic person's representative and authorized person who acts on behalf of the juristic person altogether due to the benefit in being the parties in lawsuit in the case.

However, due to the event of tort liability of the juristic person that is in line with legislation in Civil and Commercial Law in Section 76, Paragraph 1 supplementing to Section 420, the victim shall sue with proof that the act is complete with element of liability in such nature. It was to say that the juristic person's representative or authorized officer on behalf of the juristic person acts for tort which is completes with the element pursuant to Section 420. It is the conscious act and that act is illegal and careless or willful act, causing damage to absolute right of others under the relationship between the act of the juristic person's representative or authorized officer on behalf of the juristic person and incurred damage and act of tort of the juristic

person's representative or authorized officer on behalf of the juristic person stipulated in Constitution.

According to, the litigation by plaintiff with both the juristic person and the juristic person's representative or authorized officer on behalf of the juristic person altogether in litigation. It is useful in consideration on taking evidence on proof of act of the juristic person's representative or authorized officer on behalf of the juristic person since the juristic person's representative or authorized officer on behalf of the juristic person shall be involved as parties in lawsuit as well. For the litigation in this way, the plaintiff shall have overt averment that the defendant is the juristic person's representative who acts for tort, causing damage to the plaintiff. Such act is the act in the duty according to the objective of the juristic person. Therefore, the juristic person shall be liable in such act. In the event that the plaintiff sues the juristic person for liability pursuant to Section 76, Paragraph 1 supplementing to Section 420 by suing both the juristic person and the juristic person's representative altogether in action.

#### 4.2.4.12 In the event of non-overt act of the Juristic Person's Representative or authorized officer on behalf of the Juristic Person.

In some events, the finding indicated that the victim from act of tort of the juristic person did not know which the juristic person's representative or the authorized officer on behalf of the juristic person acts for tort. However, the incurred damage was overt that it was the damage derived from the juristic person. In this event, if the victim from act of tort of the juristic person who is the plaintiff sued by suing both the juristic person and the juristic person's representative or the authorized officer on behalf of the juristic person altogether in action.

Nevertheless, in attesting consideration, it was appeared that the person who acted for tort was the other person who was not the juristic person's representative or the authorized officer on behalf of the juristic person sued by the plaintiff. In this event, it may be the cause for the court to dismiss both the juristic person and the juristic person's representative or the authorized officer on behalf of the juristic person when the act of tort of the juristic person's representative or authorized officer

on behalf of the juristic person was not appeared to cause damage to others, then the juristic person needed not to be liable.

For this aspect, Jaisamut (2008) explained that “if considering pursuant to Civil and Commercial Code in Section 76, the finding indicated that pursuant to Section 76, it is not enacted that the juristic person shall be jointly liable. This is the evidence for solely suing the juristic person as the liable principal without necessity to sue the manager or the juristic person’s representative who is on behalf of the co-proxy.” Moreover, the Supreme Court has ever judged in litigating of the juristic person as the defendant that it has been enough for just specifying the name of juristic person as the defendant without requirement for specifying the name of the juristic person’s representative. However, according to significance of the Supreme Court’s judgment No. 1525/2495, the final decision was made that the juristic person’s name can just been specified as the defendant in the action to the juristic person as the defendant without specifying the name in lieu of the juristic person since the juristic person may be the principle person.

Nowadays the way of judgment, the finding described the event of the litigation by plaintiff to the defendant, the defendant is the juristic person solely liable without litigation to the representative altogether. In several cases, when the court considered and it was appeared that such damage occurred from the act of tort in performing the duty of the juristic person’s representative or the authorized officer on behalf of the juristic person, the court also judged the juristic person had to be liable.

Nevertheless, in tort liability of the juristic person in act of tort by others that the juristic person shall be liable for the offence. The aspect has been whether the plaintiff shall sue the employee who acts for tort and then sue the juristic person for joint liability or can solely sue the juristic person for joint liability since the problem may occur that the victim is not assured which employee of the juristic person who acts for tort in similar nature of liability for the act of juristic person itself. In such aspect, the judgment has been available to dismiss the plaintiff because it appeared that the employee sued by the plaintiff was not the person who acts for tort.

However, the fact that appeared the person who acted for tort was the another employee of the juristic person as shown in the sentence of the Supreme Court No. 4309/2545 that sentenced “The plaintiff sued the second defendant for joint liability with the first defendant on behalf of the employer of the first defendant without suing the second defendant for liability in the consequence of tort of C. who has been the other employee of the second defendant. Therefore, when the first defendant not needed to be liable for the plaintiff since the first defendant was not the person who acted for tort. So, no debt of which the second defendant on behalf of the employer of the first defendant was jointly liable to the plaintiff anymore. The dismissal of the Trial Court for suing the first defendant but the judgment for liability of the second defendant to the plaintiff by claiming for liability requirement in the consequence of tort of C. who has been the employee and the act of tort in the course of employment of the second defendant was the judgment out of the action.” According to such problem, Vayuphap wrote the remark at the end of the petition sentence No. 4309/2545 if the plaintiff sues the employer for sole liability under the averment that the employee acted for tort in the course of employment but in consideration, it turned to appear the another employee acted for tort in the course of employment. This event has been considered as the difference in detail and the court may judge for joint liability of the employer with the employee.

Hence, in litigating the case of tort liability of the juristic person, the nature of case in litigation to the juristic person for liability is a significant problem of which the plaintiff shall be careful and emphasize if the case is set in improper litigation. The plaintiff may be dismissed and will not be gained for incurred damage remedy reasonable for the spirit of law in the nature of tort.

#### 4.2.4.13 Matters of law in litigation to Juristic Person

Matters of law in litigating to the juristic person are the most of important things in litigation for the case of tort liability of the juristic person in order to help the victim reasonably remedied for the damage from the act of the juristic person pursuant to the spirit of law. However, since the findings in several events indicated that

the plaintiff was not remedied for damage from the defendant's act of tort just due to incomplete and improper execution of the plaintiff on the matters of law in litigation to the juristic person both of vagueness in litigation. This aspect has always been the problem often found in the event of non-overt averment by the plaintiff in the nature of allegation, causing the court unable to consider the liability of the defendant since it is not in line with the purview of Civil Procedure Code. In addition, the other main point in litigation that shall be highly emphasized has been the basic nature of tort liability because in various cases, the finding indicated that the cause of court dismissal has been due to the plaintiff's incomprehension on tort liability basis, resulting in error on setting forth of matters of law in litigation by the plaintiff. If the plaintiff has well consideration, he or she will discover the tort case has several natures of liability basis. The liability basis for some event requires the proof of offence.

In some event that the nature of liability is the assumption of liability, it is useful for the beneficiary from the assumption or some event is the liability without requirement for proof of the offence. If the plaintiff gives the precedence on the nature of tort liability basis in accompany with litigation to such the juristic person, the plaintiff will gain considerable benefit in case litigation for tort liability of the juristic person.

#### 4.2.4.14 Non-overt averment in the nature of allegation for tort liability of Juristic Person

The significant problem in this event has been the plaintiff does not accurately execute pursuant to matters of law in case of litigation according to Civil Procedure Code. In litigation, the plaintiff shall have the overt averment in nature of allegation and claim used as the source of allegation pursuant to Civil Procedure Code of Section 172 is enacted that "Subject to the legislation of Section 57, the plaintiff shall propose his or her allegation by pleading in letter to institute to the Trial Court. The plaintiff shall clearly set forth the nature of the plaintiff's allegation, execution request and also allegation used as the source of such allegation. The court shall check that plaintiff and then order to receive or repeal or return as enacted in Section 18."

The plaint sued by the plaintiff for liability of the defendant shall clearly set forth the nature of allegation and it shall not be the obscure charge. The plaintiff shall comprehend the nature of litigation for tort liability of the juristic person and the plaintiff shall have complete averment pursuant to the element of tort liability and the element for the event that the juristic person's liability which include the juristic person's representative or authorized officer on behalf of the juristic person causes damage. If the plaintiff does not have complete averment of tort liability element, the court will consider on dismissing the plaintiff since that plaint is illegal. In some case, the plaintiff was detected for none of averment on how the defendant is the juristic person acted by willfulness or negligence. When the plaintiff does not have complete averment pursuant to such element. Then the court judges to dismiss such plaintiff as in a case of which the plaintiff sued the juristic person (Ministry of Justice) as the defendant. However, the plaintiff did not have the averment how was the act of juristic person by willfulness or negligence. The plaintiff just groundlessly said that they did this and that. It was entirely the act in ministerial duty of the defendant. The court of such case judged the plaintiff's plaint was the plaint that did not clearly set forth the nature of allegation and claim used as the principle of incomplete information pursuant to Civil Procedure Code of Section 172. Therefore, the court sentenced for dismissal.

Hence, in overt averment, it is a crucial event that should be emphasized by the plaintiff. If the plaintiff does not improperly execute according to regulation of Code of Civil Procedure in such nature, it will be the cause that the court can judge to dismiss the plaintiff.

#### 4.2.4.15 Incomprehension on basic principle of tort liability in litigation for tort liability of the Juristic Person

The incomprehension on the basic principle of tort liability has been a significant problem detected in the court's judgment on several events that the court dismisses the juristic person. Such basic principle of liability has been the significant issue that should be emphasized by the plaintiff who is the litigant in litigation for tort liability of the juristic person like litigation to the natural person.

However, since tort liability according to Thai law can be classified into three important basic areas. The first area is tort liability requiring the proof of offence of liability based on Fault as appeared in Civil and Commercial Code in Section 420, Section 421, Section 428 and Section 430. The proof shall be available that such act is the act either by willfulness or by negligence. The second area is tort liability requiring the proof of act by willfulness or by negligence since the legal assumption is acquired by just proving the legal assumption or liability based on Presumption of Fault as appeared in Civil and Commercial Code in Section 422, Section 423, Section 429, Section 433 and Section 434, particularly the event that the owner and the holder are available. The last area is tort liability without requirement for proof of fault or liability without fault as appeared in Civil and Commercial Code in Section 434 and Section 437 and in the event of the owner in Section 425 and Section 436.

From the judgment appearing that the court judged for dismissal, it was partly from the problem derived from the incomprehension on basic principle of such tort liability, resulting in dismissal for victim. Even though, if there is comprehension on such basis and the juristic person is accurately sued for liability pursuant to such basic principle. The court can judge the plaintiff recovers the case and the defendant reimburses indemnity to the plaintiff like the judgment of the Supreme Court No. 689/2537 whereas the court sentenced that “in the event that it has fallen in the legal assumption in accordance with Civil and Commercial Code in Section 437, the liability shall be the damage directly occurred from the property. Even, the electric current has been the property causing the natural harm but pursuant to the action, the plaintiff claimed the cause of tort due to no cut-off of electric current by both defendants, resulting in unsafe to fire extinction and becoming the cause of fire which was spread and burnt the plaintiff ’s house. It was the act of the person and it was not the damage occurred from the property which was the electric current. According to the event based on the litigation, the plaintiff shall be obliged for proof to find whether it was both defendants. When the plaintiff cannot reasonably bring witness or evidence to court as the action, then the case may not be recovered.” From such judgment, it was deemed that the problem in this case was caused from the way that the plaintiff set the

case in litigation to the defendant as the act of tort as the result of no cut-off of electric current, resulting in unsafe for fire extinction and becoming the cause of fire that was spread and burnt the plaintiff's house. It was the act of the person.

Therefore, if the case was set such as, the plaintiff shall be obliged for proof since it was regarded as liability based on Fault pursuant to Civil and Commercial Code in Section 420. According to this case, when the plaintiff could not bring witness or evidence to the court for proof that it was the act by willfulness or by negligence of the defendants, then the court sentenced for dismissal.

Nevertheless, if in this case, the plaintiff sets the case in the nature of liability without fault as appeared in Civil and Commercial Code in Section 437, the case result will be different since the defendant's duty in bringing witness and evidence to the court for their acquittal from liability under the requirement for proof that it is just the circumstance occurred from the act of god or occurred from the fault of the victim.

Or in the event pursuant to the judgment of the Supreme Court No. 1637/2530 that the court sentenced "in tort case due to the fire incidence by willfulness or by negligence of the defendant or the employee. When the plaintiff did not claim or set the issue about the liability based on Civil and Commercial Code in Section 437, Paragraph 2, both facts in hearing was not appeared that can dryer in the defendant's plant was the property possibly causing the natural harm or by intent for use or by mechanism indication of the property. There was none of issue for the case in judgment that the defendant was the possessor of dryer and insecticide solution contained in that can required for drying in that dryer was the hazardous and the natural property or by the use pursuant to Section 437, Paragraph 2, and the incidence was not the act of god that the defendant shall be liable. When fire incidence occurred and caused the property insured with the plaintiff damaged, despite the plaintiff would reimburse indemnity to the insured according to insurance contract, but if the fire incidence did not occur from carelessness of the defendant or the defendant's employee, the plaintiff might not accept subrogation of the insured or claim the defendant to be liable for the plaintiff by claiming the cause of tort."

The problem in such case also occurred due to incomprehension on the basic principle of tort liability since the plaintiff did not set the cause of action for the defendant's liability on damage occurred from property. Despite, the fact appeared that the incurred incidence was not the act of god, the possessor of hazardous property shall be usually liable for tort pursuant to Section 437. However, in such case, when the case cannot be set in the nature of liability without fault, it should apply the principle of the consideration on general tort liability pursuant to Section 420 or the principle of liability based on fault which requires the proof that the defendant or the defendant's employee act by willfulness or by negligence. When it was appeared in this case that the defendant or the defendant's employee did not act by negligence. So, the defendant was unnecessary for liability. This case was sentenced by the court to dismiss the plaintiff.

#### 4.2.4.16 Liability of the Juristic Person in the jurisprudence of Civil Law

##### 4.2.4.16.1 Criminal Liability of Juristic Person

The criminal liability of the juristic person in the jurisprudence of Civil Law for several countries that have applied jurisprudence of Civil Law both of French Law and German Law have similar thought that the juristic person may not be liable in crime due to doli incapax by the juristic person. Therefore, "evil" cannot be available since it is just the person fiction. Then, the juristic person may not have criminal liability since the consideration whether anyone shall be incriminated must consider from 3 structures including fault element, fault and evil. The structure in part of "evil" is the significant element of criminal offense called as Criminal Offense. It is specific for natural person only that may have evil or doli capax.

However, in consideration on the criminal liability of the juristic person, it may have criminal liability when the state deems as necessary for application of criminal section to enforce the juristic person. The offense may be determined to punish the juristic person. It has been considered as the criminal policy to punish the juristic person and as the state and social protection from the influence of

the juristic person that has more influence. It is necessary for the state to have various sections for protection or punishment to the juristic person.

Conclusively, in consideration on the criminal liability of the juristic person in part of criminal offense pursuant to the Criminal Liability structure. The juristic person cannot be liable. Nevertheless, if it is the liability due to criminal policy that intends to punish the juristic person under criminal law. Then, the special law has been issued to stipulate various sections in administrative law as well as stipulate fine to the juristic person, then the juristic person may be liable under criminal law in this part. For criminal liability of the juristic person pursuant to Thai law, there has been the opinion in textbook that the juristic person shall not generally have criminal liability pursuant to Criminal Code.

Nevertheless, the juristic person is lifeless and it cannot act and have intention in the criminal liability. The juristic person has *doli incapax*, so the evil cannot be existent. Anyhow, the juristic person can have criminal liability when the law is particularly enacted that the juristic person shall be liable only.

However, according to the way of Thai Court's judgment, it was appeared that the court has judged the juristic person shall be liable in criminal law not only specific liability with specific legislation for liability of the juristic person, but the juristic person can be liable in criminal law in general event. It has been regarded the declaration of the juristic person's intention may be expressed through the juristic person's representative applying judgment pursuant to the significance of Civil and Commercial Code in Section 75.

The way of such judgment of Thai Court has still had academic dispute that the intention of the juristic person's representative has been applied as the intention of the juristic person in the criminal liability should be inaccurate because such principle is the principle of *Alter Ego Doctrine* in the jurisprudence of Common Law which has been different from the principle of Thai law which is the jurisprudence of Civil Law.

#### 4.2.4.16.2 Tort liability of Juristic Person

According to, tort liability of the juristic person in jurisprudence of Civil Law. As the result of the jurisprudence of Civil Law that has adhered the natural of the juristic person which the juristic person is the person derived from the several persons entering to “unite” and coming to “unite” like that, leading to organization with its goal, liveliness by itself, status as authentic social unit and social value indifferently from the natural person. Pursuant to this theory, it is regarded that the law just affirms the existent living condition of the juristic person only to be in line with Organic Theory. Therefore, the juristic person can have tort liability by liability on the act of the juristic person’s representative under the consideration that it is the act of the juristic person itself.

#### 4.2.4.16.3 Japan

Pursuant to Japan Civil Code, the legislation for tort liability of the juristic person has been enacted in Japan Civil Code based on Section 44 that “Juristic Person shall be liable for damage as the result of act of the manager (director) or the other representative for his or own dutiful act in the event that the damage occurs to others due to the act over the scope of the capacity objective that the juristic person, member and manager (director) who are approved for the resolution related to that act, and manager (director) and other representatives who performs according to that resolution shall be liable for incurred damage.” Tort liability of the juristic person in Japan Civil Code can be considered as follows.

**a.) Actor in the name of the juristic person-** According to Japan Civil Code in Section 44, it is enacted that if the person who acts in the name of the juristic person, including the manager (director) or the other representative, causes damage, so the juristic person shall be liable only. The juristic person shall be liable if these persons cause damage.

According to tort liability of the juristic person from the act of manager (director) or other representatives in Japan Civil Law, that act shall occur from the manager (director) or other juristic person’s representatives such as temporary

director, the juristic person's particular representative or the person who is authorized from the director to act on behalf of the juristic person's representative pursuant to Japan Civil Code in Section 55 only. That act shall be the dutiful act of these persons under the liability of the juristic person pursuant to this section without including the illegal act of the employee such as worker, machinery controller, engineer, or driver, etc.

**b.) Liable act** – The act of the manager (director) or other representatives causing the requirement for the juristic person's liability pursuant to Japan Civil Code in Section 44 shall be the act in the scope of the juristic person's objective and it is also the dutiful act within the scope of the juristic person's objective. However, if it appears that such act of the manager (director) or the juristic person's representative is the act out of the duty and out of the scope of the juristic person's objective, that the juristic person shall not be liable from such act. Nevertheless, the member, the manager (director) who approves the resolution related to that act and the manager (director) and other representatives who performs according to that resolution, they shall mutually be responsible for damage incurred from that act pursuant to Section 44, Paragraph 2.

**c.) Nature of liability**- The nature of tort liability of the juristic person pursuant to Japan Civil Code in Section 44 is the nature of liability for self-committed wrongful act. The act of the manager (director) or the representative of juristic person is regarded as the act of the juristic person and the juristic person shall be liable for that act like it is its own act. However, it shall be the act of the manager (director) or the other of the juristic person's representatives such as temporary director, the juristic person's particular representative or the person who is authorized from the director to act on behalf of the juristic person's representative pursuant to Japan Civil Code in Section 55 only. If the damage occurs from the person apart from these juristic person's representatives. The juristic person's liability will be the event of the requirement for liability involvement from the act of these parties on behalf of the employee. These persons shall be liable for its own act pursuant to Japan law that

regards the company director is the representative or the single part with the company that cannot be separated. The act of the director in the name of the company can be regarded as the act of the company.

**d.) Right of recourse** – Japan Civil Code in Section 44 is enacted for the event of the juristic person's liability from the act of the manager (director) or the juristic person's representative. The juristic person shall be liable for such act in reimbursement of indemnity to others who are damaged. However, in such section, the right is not granted to the juristic person in exercise of right of recourse to the manager (director) or the juristic person's representative that causes damage.

From the statement mentioned above can be concluded from the study on the application problem for tort liability of the juristic person pursuant to Civil and Commercial Code of Thailand, the finding described that Thai law has accepted the juristic person is liable for act of tort. It was found that pursuant to legislation of Civil and Commercial Code of Thailand, the juristic person's liability is enacted in the event that the juristic person's representative or authorized officer on behalf of the juristic person causes damage to others pursuant to Section 76, Paragraph 1 and legislation of tort liability. Such legislation regards that the juristic person is also the subject of right in act pursuant to such legislation.

In study of this thesis, the occurred academic problems and the application for tort liability of the juristic person pursuant to the way of the court judgment have been taken for analysis to compare with the way to apply tort liability of the juristic person pursuant to foreign law both in the jurisprudence of Civil Law which is the origin of Thai legislation of the juristic person's liability pursuant to Section 76, Paragraph 1 as well as the way of judgment and principle of law in jurisprudence of Common Law for analysis and comparison with the application for tort liability of the juristic person in Thailand. The study in significant aspects related to the application for tort liability of the juristic person pursuant to the general principle and the nature of tort as well as the analytical study of application problem on tort liability of the juristic person in litigation in Thailand as the litigation guideline for victim from the act of tort of the juristic person.

### 4.3 The Analysis of the Corporate Criminal Liability in Thailand should be changed

#### 4.3.1 Corporate Types

##### 4.3.1.1 Thailand

It is questionable that what kind of the authorized person who acts on behalf of the juristic person is. The legal board of commission has reviewed the amendment of the Civil and Commercial Code Section 76 in providing the performance of person includes the agent, employee and any person who can act on behalf of the juristic person. Even though, he or she is not a juristic person agent or employee but appointed to perform by law, for example the government officials who are authorized under the law, discipline or regulation during course of employment. The idea is something in common with criticism of Kittisak (2008)<sup>561</sup> and Rachata (2011)<sup>562</sup>.

In similar to the previous idea, the author has commented on the authorized person who can act on behalf of the juristic person covers with the juristic person agent, employee or person assigned to act directly or indirectly as of the juristic person's performance like the government authority as the juristic person. The author has added any person who is the representative, employee or government authority is "The authorized person who act on behalf of the juristic person" under Section 76 through all means. This may always force the juristic person's liability into accounts since under Section 76, it provides the liability in term of the primary liability of the juristic person. If the juristic person is always liable for any actions of person as an agent, employee, government authority, officer or worker may have expanded great responsibility.

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<sup>561</sup> "Retrieved by Thai Language Book Written by Kittisak Prokati (2008) Vinyuchon Publishing.."

<sup>562</sup> "Cited by Nattawut Aphiwat, Retrieved by Thai Language Journal Written by Nattawut Aphiwat (2008) Thammasat University Press. ."

Although, the performance of those persons are not related to law, regulation or a written instrument. This is not corresponding to the juristic person's liability. In fact, the performance of any person who is not the juristic person representative is nothing to do with the juristic person's performance. Hence, under Section 76 providing the juristic person's liability for actions of "the authorized person on behalf of the juristic person" who is not "the juristic person's representative" requires the proper interpretation in order to restrict the meaningful word of "the authorized person on behalf of the juristic person" for the common ground of the juristic person's liability in term of the primary liability since "the authorized person on behalf of the juristic person" may have a certain level of relationship in equal between "the juristic person" and "the juristic person's representative". This is justified to the juristic person and suit with the will of law which provides the juristic person's liability for any damage caused by actions of "the authorized person on behalf of the juristic person" as of the juristic person's actions. The author has proposed additional criteria for some consideration; What a proportion of relative duty of a person in a position or a status and objective or authority of the juristic person is like, for example an agent, employee, government authority, officer or worker whose duty is major parts in operation or authority of the juristic person.

The consideration on persons who perform accordingly as major part or authority of the juristic person can be initiated from the major performance of the juristic person describing that if persons on that position and status are not capable to perform tasks, the major duty of the juristic person may not be achieved. The author supports this hypothesis may suit to prevent the juristic person from plenty of liability in the making. Moreover, this brings a solution to amend law Section 76 for practicality of element of liability that suits with the primary liability rather than the vicarious liability of the juristic person.

In consequence, many people who are capable to perform duty as the essential part required by operation and authority of the juristic person, it is considered

as “the authorized person on behalf of the juristic person”. This makes the juristic person’s liability into accounts. The samples are as follow;

Sample 1: A person as a company truck driver drives the loading truck of the construction materials. His duty is a major part of the construction goods company. The truck driver is considered as the authorized person on behalf of the juristic person (the construction goods company).

Sample 2: A person as the cleaning worker is supposed to clean up inside offices of association, foundation and company where those organs do not involve with the duty especially, employees in the juristic person association, employees of the Kidney Disease Association of Thailand, employees of the Ruam Katanyoo (Tàiguó Yídé shàntáng) Foundation, Woman Friend Foundation or employees of the tour company, etc. Those who work in offices are not parts of the operation while the cleaning workers are not relevant to their duty. The cleaning worker is not considered as the authorized person on behalf of the juristic person.

Sample 3: Unlike the cleaning worker in duty previously, a cleaning worker who works for the hospitals, food shops, hotels which assigns the cleaning workers. The same is a security person who is employed for tasks and safety in the construction site. They are all considered as the authorized person.

Sample 4: The physician or nurse who is employed in the private hospital has major duty on a treatment of medical care. Hence, they are major actor in the private hospital whose objectives are set up for. The same covers employee who drives the ambulance. The physician and nurse who works partly as special services for personnel and students in private university or employees in the factory apart from medical treatment for patients. Even though, the university has not provided the physician or nurse for members in the university; the operational university has never stopped from

their own duty. The physician or nurse is not considered as “The authorized person on behalf of the juristic person.”

Sample 5: The inquiry official is an authority; whose duty involves with criminal investigation. The duty is a major part of the police department which is established for the public peace as well as taking part in the justice system of criminal offence against crimes for a trial. The official is the authorized person on behalf of the police department as the juristic person.

Sample 6: The employee driver of the Agricultural Land Reform Office committed a wrongful act upon others during his routine. When the duty of the office which involves mainly with rights of persons as farmers in occupying allotted lands are all about legally the utilization of land reform management by the office, the duty of the driver is nothing to do with duty of its office. The duty of the driver serves the routine work of the office. In consequence, it is discussed if the juristic person is liable for the driver’s criminal offence in term of the vicarious liability, it is not an application of Section 76. The author argued with the Supreme Court, Decision No.4197/2530 ruled that the office as the juristic person is liable for the driver under Section 76.<sup>563</sup>

Sample 7: The lay ministry is appointed by abbot whose authority is approved in written form by Ecclesiastical District Governor as a bookkeeper involving with the pittance as many as a caretaker of property in the monastery. The lay ministry is the authorized person on behalf of the monastery.<sup>564</sup>

#### 4.3.1.2 The United States of America

The explanation of liability called as Secondary liability by extendedly elaboration from the trial of the United States Court that Secondary liability is the action

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<sup>563</sup> "Supreme Court, Decision No. 4197/2530, Thai Language Version, (<http://www.doka.in.th/view-104930.html>)."

<sup>564</sup> See Footnote No. 553.

of Indirect Violation (Infringement) which will be brought up to mention, when anyone involves, materially contributes to facilitate, induce or is otherwise, responsible for the violation committed by another person directly. In the United States, there will be the law which places the rules on Secondary liability as the law in matters of patents, trademarks, copyrights. However, concerning the copyright, there has been developed a singular example of legal case separated by the court rulings. By this way, the court who is develops the theoretical principle and policies relating to such Secondary liability since from the beginning.

In general, this type of Secondary liability divided into 2 types which have been developed by the court. Firstly, it is liable for the action of others (Vicarious liability), and secondly, the liability because of having participated (Contributory liability). Although, the dividing line between the 2 types of liability is still unclear. It is the first significant condition for recording in form of Secondary liability that is the action of violation is a basis for liability.

The liability for the action of others (Vicarious liability) is the theory of liability which has been widely accepted as a basic form of liability in case of copyright infringement. The basic idea of liability for the action of the others has been developed extendedly due to the legal principle of Common Law's representative. It is a basic idea called as Respondent Superior (the responsibility of the master for the action of its subordinates).

According to this theory, the court accepts that the employer should be liable for the violation of its employees under the Master-Servant Principle, by the court has extended the liability to the person who gets the benefit from the violation. When a company or enterprise has the right or ability to prevent the action of violation, the court has judged a case of *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, In the United States, that who owns the hall, a station where to show, dance by using the music is written by having the copyright and it is the violation of such copyright, it will have to

be liable. By this way, the owner will be liable if this show existed for the profit or desired benefit to the owner of such hall and even the music band employed will be made under the contract to perform independently to the person who has made the contract.<sup>565</sup>

The Contributory liability has been widely defined that it is the form of liability of a person who has not committed to direct infringement but it has been participated in action of violation to the other persons, whether it is to get involved as a key factor in helping to commit such violation (let make it easier to get the occurring violation) including to get to know such action as infringement itself. Both factors are the key elements for liability because of involvement. The liability because of involvement (Contributory liability) is a basis of the liability theory for violation of the company business (Tort Theory of Enterprise liability). The liability because of their involvement (Contributory liability) to the third person will be liable for the violation that has been made initially on the idea basis of relationship of the third person with the action of such damage such as by promoting to propose the action or get the benefit of such action. Thus, for the case of liability due to having participation (Contributory liability) is consisted of 2 conditions: 1) perception of the tort of that person and 2) participation in support or assistance (Contribution) of such person or participation with such violation.<sup>566</sup>

Such perception may be actual perception “Actual knowledge” or significant perception “Constructive knowledge”. This condition of such perception if considering in case of liability for the action of others (Vicarious liability) and has found that the perception condition is not a key element in case of liability for the action of

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<sup>565</sup> Weissmann, A., "A New Approach to Corporate Criminal Liability " American Criminal Law Review,.

<sup>566</sup> *Ibid.*

others (Vicarious liability). As it is a key element in case of liability because of participation. (Contributory liability).

What the constructive knowledge is? Black's law dictionary defines that "if anyone should get to know any fact. Those persons shall be deemed to have been perceived such fact. In other words, the person does not percept the actual fact but it should know. It is also the legal criteria developed by the court which such person does not percept because it does not pay attention or under the circumstances. It should be perceived such as having the information is visibly appeared."<sup>567</sup> When considering the above theoretical principle, the author recommends that both liability which is the liability for the action of others (Vicarious liability) and liability because of participation (Contributory liability), which has the characteristics of being the liability of the third person for the action of another person is from a key basis of concept together that is concerning the relationship of the third person with such action of damage, especially to benefit from the action of such violation.<sup>568</sup>

Therefore, in considering the liability for the action itself (The liability for the action committed by a representative or an authorized representative). In order to answer the problem whether the juristic person will have to be responsible for the action of its representative or authorized representative or not. It should bring the concept of benefit as a key criterion in considering the characteristics of the action on duty of a representative or an authorized person on behalf of.

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<sup>567</sup> Retrieved by Thai Language Source, Nattawut Aphiwat (2008) Thammasat University Press.

<sup>568</sup> *Ibid.*

#### 4.3.1.3 The United Kingdom

The scope of relevant law against the juristic person's liability in UK can be explained that the criminal offence, UK is one of the major countries where the Common Law is based; the concept of the juristic person's liability is a result of its idea describing that a civil offence of infringement is usually applied while the criminal offence is irrelevant and deprived of it. Some jurists accordingly explained in the criminal juristic person could be applied by the criminal law but rather in term of the fine measure ruled by the court since many Common Law-based states has implemented the idea of the juristic person as the fictitious person by law, who in turn is "*Mens rea*".

Nowadays, the juristic person is only the idealistic person by law used to form the growing commercial business establishment. The jurist agrees in the common ground that the consideration of non-committed criminal juristic person may have caused to threat of the society as in the whole. Hence, there should be a certain level of criminal offence against the juristic person based on the concept of *Mens rea* but not included to the non-committed crime considered by law; the particular sections against the criminal offence of the juristic person's liability shall be applied by ways of the parliament act. In consequence, the UK Court has applied the criminal offence against the juristic person based on the *Mens rea* implementing rational grounds of the performance of the juristic person as of the authorized person; the same person by law.<sup>569</sup>

Consider the juristic person's liability in a civil offence of the infringement in UK can be explained the civil offence of the infringement can be observed by the practice of the Judicial System of the Common Law-based countries from which the application of the law has been developed due to the adjudication and the concept of Fiction Theory in those Common Law-based countries. The juristic

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<sup>569</sup> Brooks, D. S., and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," Defense Counsel Journal.

person invented by law is not self-being in the way. The human being usually behave since the concept of *Mens rea* is fundamentally not held as much as the performance of the juristic person actor is considered as the juristic person agent who acts accordingly. The former idea of the juristic person's liability was not but the rational grounds of the performance by other persons based on the concept of the Respondent Superior and Vicarious liability. When the judge ruled that the liability of the employer was the performance of the employee who acted on behalf of the juristic person. The idea applied to this matter may have caused to controversial issue in term of the particular criminal offence against the juristic person-based on an individual person is applied allowing the juristic person to deprive of all punishment measures if the adjudication remains the concept in its application.<sup>570</sup>

The similarity has seen from the promulgation of the Crown Proceeding Act 1947 which enforces the crown (the government units) in the liability from the performance of the administrative authorities and employees. It is the concept of Vicarious liability; in the practice, against others is based on the results of the principle of the Common Law.

The court system in the Common Law-based gradually has changed to the term that the juristic person is more independently identical status to the human personality describing that its rights and duties by law are engaged with the juristic person through the performance; a so called the Organic Theory. The additional theory has changed the ways of thinking in the juristic person can commit any of the civil offence and even is against the infringement apart from the common use of the concept of Vicarious liability.<sup>571</sup>

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<sup>570</sup> Khanna, V. S., "Corporate Criminal Liability: What Purpose Does It Serve?," [Harvard Law Review](#).

<sup>571</sup> Retrieved by Thai Language Source, Nattawut Aphiwat (2008) Thammasat University Press.

Therefore, it can say that, Thai law has observed scope of the juristic person's liability in UK in term of an offence of infringement with a diverse use of Vicarious liability performed by an actors, the juristic person agents and any employees. Later, the UK Court System has implemented the Organic Theory.

In particular, against the juristic person's liability in various grounds of extensive offences apart from the use of former Respondent Superior and the concept of Vicarious liability. The theory is a principle of the performance of the corporation (organ) by the juristic person is as of the actual performance of the juristic person. The sample was brought from the Lennard's case [*Lennard's Carrying Co., Ltd v Asiatic Petroleum Co., Ltd. (1915)*] in that the judge, Lord Viscount Haldane, adjudicated the juristic person's liability of the company performing the cruise business explaining "the juristic person is abstract, no state of mind and consciousness in it. The performance by the juristic person agent who acts accordingly by the shareholders' general meeting is always considered as the intention and the purpose of the juristic person under the authority given through a board of directors or an authorized person appointed by the shareholders' general meeting. Lennard is the managing director, so his performance is not himself but the performance of the company."<sup>572</sup>

From the given sample have been explained the performance and the intention of persons as the Organs via the principle of Organic Theory as of the juristic person's. Other includes the judge, Lord Denning L.J. adjudicated in the court case, *HL Bolton Engineering Co., Ltd. v TJ Graham & Sons Ltd. (1956)* that "A company has many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and acts in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent

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<sup>572</sup> See Footnote No. 358.

the managers who represent the directing mind and will of the company, and the control what it does. In addition, the state of mind of these directors and managers who act as the juristic person agents are nothing but more like the state of mind and intention of the company.”<sup>573</sup>

In fact, we need to consider if the liability of the manager is the juristic person’s liability. Regarding the liability of the juristic person by law generates its civil offence of the infringement. It is noted that if the common idea of the criminal offence in consideration of the malice in law (*Mens rea*) of the director or the manager is as of the company. When the criminal law is applied against the malice in law of the juristic person directly or it is an element of the occurring criminal offence observed by the intention of operational company through activity with the intention performed by the subordinates or the juristic person’s representatives in term of rationales, positions, facts and circumstances related to the dispute.

Obviously, the Primary liability by the juristic person which is different from the Vicarious liability was sampled in the criminal case between *Tesco Supermarket Ltd v. Nattrass (1971)* when Judge Lord Reid adjudicated that “When the ordinary person is considered, the person is always real mind who can act deliberately or even negligently by oneself. While, the company which lacks the capability is operated by the ordinary person who acted only as if the company does. The performance under his or her consciousness is in turn under the state of mind of the company, not under the vicarious conditions.”<sup>574</sup>

Regarded on the Primary liability of the juristic person with the use of the Organic Theory. The circumstance requires activity performed by the authorized persons in the company (Organs) who act under scope of the officials’ authority unless

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<sup>573</sup> DeMaglie, C., "Models of Corporate Criminal Liability in Comparative Law," Washington University Global Study of Laws Review.

<sup>574</sup> French, D., Mayson, S., and Ryan, C. (2013).

the performer acts it excessively out of the scope resulting the none- liability of the juristic person. The same idea explains when the ordinary person is not liable what he or she does accordingly under the unexpected circumstances. Similarly, the concept of Vicarious liability holds the idea that actor is liable for the vicarious conditions when the authorized juristic person's agent acts accordingly. The good sample was the case between the *Royal British Bank v Turquand 1856*, it requires the execution of a board of directors, a managing directors, directors and the subordinates who are engaged by law under the circumstances; 1) The activities are under the scope of the officials' authority or objectives of the company by law including the written instrument of established the juristic person or the regulation and 2) the in-scope of the officials' authority is required.<sup>575</sup>

Additionally, the consideration includes the performance within the authorization given which can be accounted for the performance of the juristic person. Sample was raised from the case between *Daimler Co., Ltd. v. Continental Tyre & Rubber Co., (Great Britain) Ltd. 1916*. When the court Lord Parker gave his adjudication describing that "Any activities of the juristic person's employees as the company's organs including directors or managers as many as the secretary and the other involves whose authorization is in-scope are all counted for the performance of the company."<sup>576</sup>

#### 4.3.1.4 France

For the study of Corporate Criminal Liability scope in France. In this thesis is studies only the issue of liability of the juristic person if it is the action within the objective scope or the authority of the juristic person under Article 121-3.<sup>577</sup> Even, the provision under this Section 76, paragraph 1 does not legislate clearly meaning to

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<sup>575</sup> Cavanagh, N., "Corporate Criminal Liability: An Assessment of the Models of Fault.," Journal of Criminal Law.

<sup>576</sup> *Ibid.*

<sup>577</sup> See Footnote No. 439.

be the action within the objective scope or authority of the juristic person under the section. However, when conserving the French Code which is the body of the provision. It will be seen in case of the juristic person is liable under Section 76, paragraph 1. It is only the liability if it is acted according to the duty of the representative or the authorized representative within the scope of objective or the authority of the juristic person. In addition to, under Article 121, paragraph 2 legislates that if it is the action outside the scope of objective or the authority of juristic person only the person who is agreed to act or the person to act together with the liability to the external persons.

By this way, the author does not stress on consideration of the issue of criteria for considering the scope of objective or the authority of the juristic person. But, it will emphasize on consideration of issue of action in accordance with the duty of the representative or the authorized person, significantly. However, in term of ruling the liability of the juristic person under the law. It must be considered, basically, of the objective or the authority of the juristic person. This is because the Article 121-3 has legislated that the juristic person shall have the right and duty under the provisions of this code or other laws within the scope of authority or the objective as legislated or the identified by law, the regulation or the constitution in a part of established the juristic person by specific law. In particular, the public of the juristic person, the authority of the juristic person is always identified by the law establishing such juristic person. For the private of the juristic person, especially the established juristic person under the code, the objectives are always identified in the regulation or the constitution. When it is registered as the juristic person. It can say that, the word provisions stating the objective scope or the authority of the juristic person under the law will aim to convey the objective scope or the authority of the public of the juristic person. By this way, if it is considered and found that any action does not perform within the objective scope or the authority of the juristic person, it shall not be liable for any such action in principle unless it is made with exception.<sup>578</sup>

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<sup>578</sup> Pop, I.A. (2006).

However, the liability in some matters by condition may not take into account the objective scope or the authority of the juristic person as main point. Such case shall be regarded as the exception because if it takes into account the objective scope or the authority, it is impossible to protect the real existing right of the external person, such as the liability of the juristic person. In the event of the representative or the authorized person on behalf of the property of others, it must return to them. If it cannot return, it will be charged by the price under undue enrichment, or even any liability arising from the violation (When it violates the other, it is liable to accept), but such case is to be considered that whether it is the acceptance of property in the function of the representative or the authorized representative or not. Because it is the case or by the authorized representative receives the other property as its personal debt such as the case of the representative accept to pay the debt from the agent of the debtor which is its personal debt.

In spite of, the debtor has paid the debt by itself and it is also to consider whether it is the violation in the duty of a representative or an authorized representative or it violates itself or not. If it violates itself, not violate in the duty of a representative or an authorized representative on behalf of the juristic person, it is not liable for. By this way, in consideration of the issue of the characteristics of the action according to the duty of a representative or an authorized representative is the separate issue with regard to the objective scope or the authority of the juristic person. In this section, it will state the consideration of the action according to the duty of a representative or an authorized representative. The key point to be considered in this matter is to consider which criteria for considering the actions of the juristic person's representative or the authorized person to act on behalf of duty or off-duty.

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#### 4.3.1.5 Japan

##### 4.3.1.5.1 The Criminal Offence

Japan which is one of the Civil Law-based countries applied its law against the juristic person's liability. Other Civil Law based countries include France, Switzerland, and Germany where the concept of the Fictitious Person remains in common that it is unable to such liability by law, without the real intention and unconsciousness. The criminal offence is only applied against any ordinary persons. In general, the jurists in Japan have cling to the concept applied by the major Civil Law-based countries; France and Germany. The more specific law for the penalty measure is applied against the juristic person who is found guilty of committing some severely impacts on economy, finance and peace in the country.

It can be said that when the juristic person's liability of the criminal offence is concerned, the Civil Law-based Court System does not give the punishment against the juristic person but only the more specific criminal law against it is provided for the court to apply in both direct or indirect way. Especially, no criminal intent (*Mens rea*) is considered as the juristic person's liability of criminal offence in particular.<sup>579</sup>

##### 4.3.1.5.2 The Juristic Person's Liability in a Civil Offence of the infringement

The Civil Law is in application with the use of the Organic Theory describing when any persons form a corporation, it is like an organ which possess their own purposes are more like being with own mind and are distinctive to the ordinary person. Thus, the juristic person is liable for an offence of the infringement.

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<sup>579</sup> Brooks, D. S., and Frongillo, T.C. , "Environmental Prosecutions: Criminal Liability without Mens Rea and Exposure under the Responsible Corporate Officer Doctrine," Defense Counsel Journal, .

In Japan, the juristic person's liability of the juristic person representative is accounted for as it is of the juristic person. It is observed by the Civil Code of Japan, Article 44 providing that "A juridical person is bound to make compensation for any damage inflicted upon others by its managers (directors) or other representatives in the performance of their functions. When the damage is inflicted upon others by an act not within the scope of the objective of the juridical person, the members and managers (directors) who voted in favour of the act, as well as the managers (directors) and other representatives who executed the same, they are jointly responsible to make compensation for such damages."<sup>580</sup> These can discuss the juristic person's liability of the infringement by the juristic person under the Civil Code of Japan, Article 44.

Question is what types or forms of the juristic person have been provided as the juristic person's liability of the civil offence in the Civil Code of Japan, Article 44. It is found that "The juristic person is responsible to make compensation for any damage inflicted upon others and rather not confine to any types or forms". It may assume that any group of persons formed as the juristic person are all grouped under the Civil Code of Japan, Article 44 except the more specific law against the juristic person's liability is provided in more particular way.

Regarding the juristic person's liability in term of the Vicarious liability under the Civil Code of Japan, Article 44. Any persons who act on behalf of the juristic person is responsible for any offences by law.

In the case, there are some damage, the managers (directors) or the other juristic person's representatives specified as the temporary directors (Article56), the appointed of the juristic person's representatives (Article57) or even any authorized persons acting under the given authorization by the directors for the juristic person's representatives in an established of the juristic person are liable for any

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<sup>580</sup> See Footnote No. 540

compensation under the Civil Code of Japan, Article 55 when the given authorization is not conflicted by regulation set up in the written instrument or the general meeting of the shareholders' vote as much as in the scope of the officials' authority, but not include any activities performed by employees, the machine operators, engineers or even the company drivers. More clearly, the juristic person's liability is accounted for any damage inflicted upon others with compensation under the Civil Code of Japan, Article 44. Questions remain are how much the scope of objectives and the authorized person are performed when the juristic person's liability is accounted for.

Becker and Ernest (1921) discussed that any activities executed by the juristic person's representatives with unbounded scope of the officials' authority is nothing to do with the juristic person and rather the activities which the juristic person's representative may assign the other representative to perform in achieving the set-up objectives are not inflicted upon others. But, if they are caused to damage upon others, the assigned representatives are responsible for compensation; considered as not the performance of the juristic person in direct ways. Practically, the victims may more suffer from the performance since any person who decides to deal business with any juristic person is reliable on the juristic person's representatives of such position in the established of the juristic person. Upon damage with compensation by irresponsible juristic person, it may not be covered completely to the victims by the liable of the juristic person who causes damage since he or she is the ordinary person may not possess as much as assets for making compensation when compared to his or her juristic person's alone.<sup>581</sup>

It is also a requirement of any person who wants to deal with any of the established juristic person to find out how good to the juristic person's representative is in term of the financial capability. Unwisely, this may delay such level of disruption on dealing business with the individual juristic person's representative.

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<sup>581</sup> D. Becker, and Ernest, J. , "The Principle and Practice of the Civil Code of Japan," Yokohama: Kelly and Walsh Limited. (1921).

The law provides that the juristic person shall be responsible for the juristic person's representative who acts on behalf of it. In any circumstance, when the unbounded scope of the officials' authority is found, the members of directors and managers who give the authorization as well as the assigned actor shall jointly be responsible for the compensation by any particular cases.<sup>582</sup>

According to Becker and Ernest (1921), the Civil Code law of Japan, Article 44 para 2 provides a broader way in application when the unlimited scope is executed by the juristic person's representative who causes any damage and performs accordingly any activities for the juristic person that he or she shall pay for the costs to others. Meanwhile, the juristic person's representatives, members of directors and managers who vote for the assignment shall be also responsible for such costs. Becker and Ernest (1921) may not be clarified in issue that the juristic person's liability against the others is obliged by law when the juristic person's representative acts out of the scope of providing objectives. They added when the juristic person's representative acts beyond the given objectives, the juristic person shall not be responsible for the liability by law. In general, he discussed on this in providing that the reliability of the juristic person can be protected from any threats when the Civil Code of Japan, Article 44 supports in the provisions on members and/or directors who vote for any given authorization including the other directors and agents shall pay for any required compensation caused from achieved performance.<sup>583</sup>

Apart from that, Branco (2006) discussed the juristic person's liability of an offence of the infringement performed by the directors or other representatives who act accordingly by the objectives is accounted for when the judgment of the Supreme Court explained "the Civil Code, Article 44 para 1 provides in statement against the liability of directors or other representatives who involve with

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<sup>582</sup> *Ibid.*

<sup>583</sup> *Ibid.*

any damage upon the others but rather in the scope of his authority by given objectives. Such damage caused by the juristic person is the responsibility without the consideration of the malice by law more or less.” In practice, Article 44 provides when the performance of the juristic person is in the scope of providing objectives as much as the scope of the officials’ authority. While on the contrary manners, the juristic person is considered as deprived by its liability by law. In turn, members and/ or managers (directors) who approve the authorization of the performance acted by other managers (directors) or other representatives shall be liable to any occurred damage.<sup>584</sup>

The author discussed by considering the Supreme Court, Decision No.2837/2522 about the unbound scope of the given objectives but considered as authorization of the juristic person’s representative may be exceptional. The issue should be focus on the major practice relating to the authorization or the scope of the objective guides for the juristic person and the juristic person’s liability from unbound scopes hold be consist of any other circumstances (for the benefit of the juristic person) of which it is beyond the condition under the juristic person representative’s authority. In this case since in reality, application of law may be a result of the lawful enforcement. In the extraordinary case, the juristic person’s liability may be accounted for the others when the juristic person’s representative acts beyond his or her scope of objectives (but under his or her authority). While, the juristic person is not liable to the others despite the performance of the juristic person’s representative is in the scope but with accountability of the unbound scope of authority.<sup>585</sup>

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<sup>584</sup> H.D. Branco, "Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons from Common Law Developments" (Master Degree Thesis, , University of Saskatchewan., 2006).

<sup>585</sup> See Supreme Court, Decision No. 2837/2522, Thai Language Version, (<http://www.deka.in.th/view-36307.html>).

#### 4.3.1.6 Germany

Germany is one of the Civil Law-based countries like in Japan. The Organic Theory is initiative as the principle of the German Civil, Code Section 27<sup>586</sup> on an offence of the infringement and is covered in Section 823-853 providing the offences in general. In fact, Section 31 provides on the liability of an association for organs, namely, the juristic person's liability (association) in that "Association is liable for any damage upon others when a board of directors, directors or other representatives are appointed by law and act accordingly."

Questions rose under the German Civil Code, Section 31<sup>587</sup> can be discussed as; if consider the German Civil Code, Section 31 providing what types or forms of the juristic person's liability of the civil offence are like. It is found that the forms of the juristic person supporting by the German Civil Code are consisted of 2 forms; association (or the Verein) under the German Civil Code, Section 21, 22 and 23<sup>588</sup> including association without objectives as non-commercial association which is

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<sup>586</sup> German Civil Code, Section 27 Appointment of and management by the board,

(1) The appointment of the board is by resolution of the general meeting.

(2) The appointment is revocable at any time, notwithstanding the claim to payment in conformity with contract. The revocability may be restricted by the articles of association to the case where there is a compelling reason for the revocation; such a reason includes without limitation a gross breach of duty or inability to effect proper management.

(3) The management by the board is governed by the provisions on mandate in sections 664 to 670 with the necessary modifications.

<sup>587</sup> See Footnote No. 468

<sup>588</sup> German Civil Code

Section 21, Non-commercial association

An association whose object is not commercial business operations acquires legal personality by entry in the register of associations of the competent local court (Amtsgericht).

Section 22, Commercial association

An association whose object is commercial business operations acquires legal personality, for lack of special provisions under Reich law, by state grant. The grant is in the power of the state (Bundesstaat) in whose territory the association has its seat.

Section 23, Foreign association

An association whose seat is not in a state (Bundesstaat) may, for lack of special provisions under Reich law, be granted legal personality by a resolution of the Federal Council (Bundesrat\*). Under Article 129 of the Basic Law (Grundgesetz), the Federal Minister of the Interior (Bundesminister des Innern) is now competent.

established by the registration system at the local relative offices (the Magistrate Court ) or association with objectives as commercial association which is granted permission by the local administration where the organization is located and the foreign association where it is located outside Germany. While, the foundation (or the Stiftung) which requires the written instrument for its establishment by law along with particular concerning with the foundation is valid through certification given by the government authority.

In fact, the German Civil Code provides more Section 23, 27(3), 28-31 and 42<sup>589</sup> in application of the juristic person in a form of foundation by adaptation (Mutatis Mutandis). In addition, the other juristic person includes in a form of the Stock

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<sup>589</sup> German Civil Code

Section 23 *See* Footnote No.578

Section 27(3) The management by the board is governed by the provisions on mandate in sections 664 to 670 with the necessary modifications.

Section 28, Passing of resolutions and representation

(1) If the board consists of more than one person, resolutions are passed under the provisions of sections 32 and 34, which govern the resolutions of the members of the association.

(2) If a declaration of intent is to be made to the association, it is sufficient for it to be made to a member of the board.

Section 29, Emergency appointment by local court [Amtsgericht]

To the extent that the board is lacking the necessary members, they are to be appointed, in urgent cases, for the period until the defect is corrected, on the application of a person concerned, by the local court [Amtsgericht] that keeps the register of associations for the district in which the association has its seat.

Section 30, Special representatives

It may be provided by the articles of association that, in addition to the board, special representatives are to be appointed for particular transactions. In case of doubt, the power of agency of such a representative extends to all legal transactions that the sphere of business allocated to him normally entails.

Section 31, *See* Footnote No. 468

Section 42, Insolvency

(1) An association is dissolved by the commencement of insolvency proceedings. If the proceedings are discontinued on the application of the debtor or terminated after the confirmation of an insolvency plan that provides for the association to continue in existence, the general meeting may pass a resolution that the association is to continue in existence. The articles of association may provide that, if insolvency proceedings are commenced, the association is to continue as an association without legal personality; in this case too, if the requirements of sentence two above are satisfied, a resolution may be passed to continue the association as an association with legal personality.

(2) If an association is insolvent or is overindebted, the board must petition for the commencement of insolvency proceedings. If there is delay in petitioning, the members of the board who are at fault are responsible to the creditors for the damage resulting from this; they are liable as joint and several debtors.

Corporation. For example, or any forms of the established juristic person under the Public Law, of which it is supported under the German Civil Code provides Section 31 for an application of the financial office, corporation, fund or foundation and other institutes by the Public Law by Mutatis Mutandis including an application of the civil offence of the infringement against the performance acted by the directors. From the judicial system as based-practice, it is concluded that the German Legal System allows an application of Section 31 against the various forms of the juristic person by Mutatis Mutandis, whatsoever it is not conflicted by the position of the individual juristic person.<sup>590</sup>

#### 4.3.1.7 Analysis the Foreign Law that can be solved the problems of Thai Law

The law that should be taken to develop the new indication for Corporation liability in Thailand is the law of German which focuses on the juristic person is liable for actions of the authorized person.

It is questionable that what kind of the authorized person who acts on behalf of the juristic person is? The legal board of commission has reviewed the amendment of the Civil and Commercial Code Section 76 in providing that the performance of person includes the agent, employee and any person who can act on behalf of the juristic person even though he or she is not a juristic person agent or employee but appointed to perform by law. For example, the government officials who are authorized under the law, discipline or regulation during course of the employment. The idea is something in common with criticism of Kittisak (2008) and Rachata (2011).

In similar to the previous idea, the author has commented on that the authorized person who can act on behalf of the juristic person covers with the juristic person agent, employees or person assigned to act directly or indirectly as of the juristic person's performance like the government authority as the juristic person.

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<sup>590</sup> Retrieved by Thai Language Source, Nattawut Aphiwat (2008) Thammasat University Press.

The author has added that any person who is the representative, employee or government authority is “the authorized person who act on behalf of the juristic person” under Section 76 through all means. This may always force the juristic person’s liability into accounts under Section 76, it provides the liability in term of the primary liability of the juristic person. If the juristic person is always liable for any actions of person as an agent, employee, government authority, officer or worker may have expanded great responsibility, although the performance of those person is not related to law, regulation or a written instrument. This is not corresponding to the juristic person’s liability. In fact, the performance of any person who is not the juristic person’s representative is nothing to do with the juristic person’s performance.

Hence, under Section 76 providing the juristic person’s liability for actions of “the authorized person on behalf of the juristic person” who is not “the juristic person’s representative” requires the proper interpretation in order to restrict the meaningful word of “the authorized person on behalf of the juristic person” for the common ground of the juristic person’s liability in term of the primary liability since “the authorized person on behalf of the juristic person” may have a certain level of relationship in equal between “the juristic person” and “the juristic person’s representative”. This is justified to the juristic person and suit with the will of law which provides the juristic person’s liability for any damage caused by actions of “the authorized person on behalf of the juristic person ”as of the juristic person’s actions.

Although, the interpretation of the authorized person on behalf of the juristic person like the person is not suited with the Japanese Civil Code, Article 44 (associated with Article 55) or even the German Civil Code Section 31, of which is the original draft of Thai Civil Code Section 76 as many as not in corresponding to the UK Court’s adjudication. The element is sourced under Section 76 and the concept of the Organic Theory which roots the liability under Section 76 in term of the primary liability. The consideration of the disputed matters includes others’ reliability toward the performance of either the juristic person’s representative or the authorized person

on behalf of the juristic person whose relationship is linked closely with the juristic person without doubts.

The author has proposed the alternative of definition of “the authorized person on behalf of the juristic person” in order that the term may be practical to an application of a relative law. At the same time, “the authorized person on behalf of the juristic person” is an agent, an officer, an employee or other person who is appointed or assigned in any positions for tasks of major parts of its duty accordingly by objectives or authority of the individual juristic person.

In the case, the employee is charged with offence against the other’s damage, the employer is liable for the employee’s action under the Civil and Commercial Code Section 425 in term of the vicarious liability even though the employer is not an actor. The offence of tort is against the performance acted by an employee alone but the employer is jointly liable for the employee’s action when action is inflicted damage upon others meanwhile the employer can take recourse to the employee under Section 426.

At the same time, if the representative or the authorized person is in a position as employee of the juristic person since his or her duty may engage with contract between them. The employee is paid for wages and is under a line of command of the juristic person as the employer. Accordingly, when the representative or the authorized person is offensive to cause damage to others. The juristic person is liable under Section 76 in term of the Vicarious liability for his or her employee’s action.

Considering most of adjudication by the court presently, it is not clarified enough for each case. When we considered the several court judgment documents; it is found that the judge always decision was the juristic person’s liability under the Civil and Commercial Code Section 425 without a clarification if the employee is in a status of either “an agent” or “the authorized person in behalf of the juristic person”. Evidences are as follow;

The Supreme Court, Decision No. 4223/2542<sup>591</sup> described the second defendant and the company Thor is subsidiary company which holds the same objectives of business operation in the Central Airport Plaza Shopping Mall. Considering about the contract which was made between the Company Thor and the first defendant when the security personnel was requested under the contract by the company to the first defendant as the partnership company for security duty at the mall, the objectives of the company was a benefits from using the business space for running business. The security person worked for the first defendant was proven to careless inspection of the parking cards in order that the parking car might not have been stolen. Later, the victim's car (Mr. Sor) was stolen making the employee's liability into accounts under the Civil and Commercial Code Section 420. The first defendant as the employer was jointly liable for the employee's action who acts some torts against the property of Mr. Sor under the Civil and Commercial Code Section 425.

The Supreme Court, Decision No. 7820/2538<sup>592</sup> described the plaintiff brought in the car for washing and maintenance at the gas station owned by Mahachai Partnership Company Limited as the first defendant when the employee received the car and performed duty accordingly by purposes of the Partnership. Later, the employee gave the car to other without identifications and documents to confirm his or her ownership of the car. The employee was found careless causing a loss of the plaintiff's car. Hence, the defendant and the employee are both jointly liable for actions under the Civil and Commercial Code Section 425.

The Supreme Court, Decision No. 7869/2542<sup>593</sup> described the first defendant as an owner of the Khaosod newspaper when the second defendant was

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<sup>591</sup> See The Supreme Court, Decision No. 4223/2542, Thai Language Version, (<http://www.deka.in.th/view-25037.html>)

<sup>592</sup> See The Supreme Court, Decision No. 7820/2538, Thai Language Version, (<http://www.deka.in.th/view-1357.html>)

<sup>593</sup> See The Supreme Court, Decision No. 7869/2542, Thai Language Version, (<http://www.deka.in.th/view-25111.html>)

posted as the publisher and advertiser. On March 27, 1992 (B.E. 2535), the both defendants were accessory to publish news on the first page in the newspaper issue on March 27, 1992. Testimony was proved to be defamation against the plaintiff by publication at the Prae provincial court. Thus, the case is considered as both the civil and criminal offence. The judge requires the judgment based on the criminal offence under the criminal code Section 46 for the supporting evidence in the Civil Trial Court. After, the criminal offence was brought into judgment at the Appeal Court Region 2 described the second defendant found guilty of defamation as charged as reference in the adjudication by the Appeal Court Region 2, Document No.4, the judgment of the civil offence by the Supreme Court Decision was in agreement of the Civil Trial Court result as the contents in the news were imputation against the plaintiff by publication causing an insult and hatred against the plaintiff. The judge determined by the action of the second defendant and ruled that it was the defendant's liability of criminal offence against the plaintiff under the Civil and Commercial Code Section 423, para 1 when the first defendant was jointly liable for the second defendant's action as his or her employee under the Civil and Commercial Code Section 425.

Practically, from the evidences of the adjudication by the court, it is obvious that the judge considered the juristic person's liability as an employer under Section 425 which provides the relationship between the juristic person and the employee from the legalised contract for the principle idea described in the case. The author discussed if a person is considered as "the authorized person on behalf of the juristic person" under Section 76, the employees which included in the adjudication; security guard, maintenance worker in the service gas station, the editor of the newspaper were all assigned by major duty of their own company as the juristic person. The disputed matters occurred when those employees acted offensively against the others' damages. It is questionable if these actions were considered as a liability under Section 76.

The author adds that when the juristic person being in the status of a person as "the juristic person is a person on behalf of the representative" who is engaged

with the juristic person or a person is “an authorized person on behalf of the juristic person”. It is suggested that an employee was “the representative” or “the authorized person on behalf of the juristic person”. In the case, that a person caused some damage to others, the juristic person was liable for the employee’s action against the other’s damage as of its own under Section 76, apart from Section 425 describing that the status of the employee is based on the juristic person’s liability in term of the primary liability under Section 76. A person who is engaged with the employee is considered as the agent or the authorized person or both status. Hence, the juristic person’s liability may be interim of the primary liability and the vicarious liability under Section 425. Even though, the application of the law may require the will of each relative law providing the treatment on a security of the other party from action with deliberately act or with negligence act including an offence of vehicle running with engine under Section 437.

The difference of taking recourse on the compensation paid by the juristic person since the liability under Section 76 is in term of the primary liability but Section 425 concerns the term of the vicarious liability. To be more precise, the damage that the juristic person paid depends on what law is applied when it is liable for the employee’s action under Section 425. The employer (The juristic person) is entitled to take recourse from the employee in full amount under Section 426 because the employer is not wrongful but is liable for the other who loses by paying compensation to cover damage while the juristic person is liable for the employee as “the representative” or the authorized person on behalf of the juristic person under Section 76. The juristic person cannot take recourse directly on the employee but the consideration requires for what actions “the representative” or “the authorized person” are considered liable.

The dissimilarity of the entitlement of taking recourse depends on the prescription of the recourse action. When the employer takes recourse under Section 426, the prescription is not the same as one under Section 448 (one year counting from the recognisable victim against the offence and the actor who is engaged to pay for

compensation or ten years counting from the ground charge) since the case is not the victim who files the case against the actor or the offender. The prescription lasts in ten-year time under Section 193/30 due to no law specified the duration of the prescription. How long the prescription is likely to be and can be referred to the written instrument which the juristic person requests for taking recourse from the representative or the authorized person, namely, failure to execute his or her duty by the contract made as the representative or employment. In fact, no prescription states in any relative law, hence it is estimated in ten year-time under Section 193/30. When, the claims are an offence made by the representative or the authorized person against the juristic person, it is under Section 448. The prescription is mainly about the indemnity (one year counting from the recognisable victim against the offence and the actor who is engaged to pay for compensation or ten years counting from the ground charge). However, if the prescription is claimed by the victim against the juristic person's liability as the employer under Section 425 or even against the juristic person's liability in term of the primary liability under Section 76, it is in the same range of the prescription from an offence under Section 448.

From the difference of the liability, entitlement of taking recourse and the prescription of taking recourse in aforementioned, the author discussed about the consideration of the juristic person's liability for an offence of "the agent" or "the authorized person" when the dispute is at the court for a compensation. The victim should consider on person who is liable. Especially, the status of the juristic person's liability and which status of the juristic person's liability is like in order to receive the loss. It is suggested that fact and prescription by law require for the claims. For example, the prescription for the file at court and even the financial status of the person's liability. Usually, the financial status of the juristic person is always more stable than the representative or the authorized person. Therefore, the claims for the loss against the juristic person's liability under Section 76 is always successful with full amount of compensation.

The practice is similar to claim for the juristic person's liability and the representative as well as the authorized person under Section 425. On another hand, the juristic person may be bankrupt due to the loss of business, the claims for the jointly liability of the juristic person as employer, representative and authorized person under Section 425 is more benefit since the claims on liability of the representative and authorized person can be in full amount as they are joint debtor under Section 291 and all joint debtors from the juristic person, the representative and the authorized person under Section 425.

It can say that, if it tends to consider the liability is under Section 425 which is more specific law and it should be applied the claims on that. The author does not agree because Section 425 is not associated with Section 76. Since, they are both designated in different provisions in the element of a person's liability under Section 76 and Section 425 which is different describing that Section 76 provides the juristic person's liability related to a person as "the representative" or "the authorized person" whose relationship is attached to the juristic person who shall be liable for them while under Section 425 providing the employer's liability for the "employee's action".

Moreover, when the relative laws of this 2 are designed in different purpose, the application of either law may allow the juristic person to avoid its liability by using contract as tool accordingly as the employment contract. This helps the juristic person clings to the entitlement on taking recourse when it is liable for the employee's action making useless under Section 76. Amazingly, Thai Legal System issue law in support the existence of the juristic person as the ordinary person with right and duty but it is not liable for offences as the ordinary person.

Further discussion from the aforementioned, in the case that the author added issues of the claims on the juristic person's liability for offensive actions of "the representative" or "the authorized person" as an employee under Section 425 and by adjudication of the court in a form of compensation, the claims on the juristic person's liability can be considered as an employer under Section 425 associated with as the

juristic person under Section 76. The victim may need to investigate which status of the juristic person is likely to be most profitable for him or her.

In summary, when the employee of the juristic person is in a status of “the representative” or “the authorized person” on duty, the liability for any damage can be considered as an employee under Section 76 while this person whose status is not “the representative” or “the authorized person” but worker or officer employed in some tasks apart from the objectives or duty of the major part of such juristic person. They are only common employees. Hence, the juristic person is liable for the employee’s actions under Section 425, not Section 76. In the case, that the representative or the authorized person is not an employee by the employment contract earning wages, the juristic person is liable for their actions under Section 76, not Section 425. For example, the volunteer of the foundation whose wage is not paid.

In the case, the principal appointed any person as the juristic person agent who acts some damage to others, the principal and the juristic person agent are both jointly liable for the consequence under the Civil and Commercial Code Section 425 associate with Section 427 in term of the Vicarious liability. The offensive ground by law provides the juristic person agent’s liability in different manner to the principal who is jointly liable for the juristic person agent’s actions causing damage to others meanwhile the principal is entitled to take recourse from the juristic person agent under Section 426.

Question what if the juristic person agent is also in a status of “the authorized person” given by the juristic person’s representative in order that his or her task can be executed by objectives or duty of the major parts of the juristic person, his or her actions which cause any damage to the other can be considered as the juristic person’s liability under Section 76.

Moreover, in this point, evidences are raised from the adjudication of the Supreme Court Decision describing the juristic person is jointly liable for the juristic person agent’s action under Section 427 as follow;

The Supreme Court, Decision No. 243/2530<sup>594</sup> described the company as the third defendant lent the first defendant, a taxi car for services on behalf of the third defendant whose benefit relies mainly from its business observed by the trademark on the car. This practice of manner by the third defendant is in term of a straw man. Thus, the third defendant is liable for the first defendant's action when any damage to other is accounted for.

The Supreme Court, Decision No. 3147/2532<sup>595</sup> described the second defendant who owns taxi car on service under the Taxi Cooperative Establishment Co., Ltd. as the third defendant that pays a monthly fee leasing car to the third defendant. The case is in term of a straw man for the first defendant who drives but in turn who performs the task for the third defendant. The third defendant is jointly liable for the action of the first defendant of any offences when the second defendant has also gained benefits from action of the first defendant. The first defendant is considered as the juristic person agent of the second defendant. Hence, the second defendant is jointly liable for the action of the first defendant whatsoever.

The Supreme Court, Decision No.4771/2533<sup>596</sup> described the second defendant is a limited company with license of the passenger business service. When, the first defendant who is as the juristic person agent of the second defendant drives car causing damage to others, the second defendant as the principal shall abide being liable by law without doubts.

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<sup>594</sup> See The Supreme Court, Decision No. 243/2530, Thai Language Version, (<http://www.deka.in.th/view-25247.html>)

<sup>595</sup> See The Supreme Court, Decision No. 3147/2532, Thai Language Version, (<http://www.deka.in.th/view-22390.html>)

<sup>596</sup> See The Supreme Court, Decision No. 4771/2533, Thai Language Version, (<http://www.deka.in.th/view-24377.html>)

The Supreme Court, Decision No. 944/2536<sup>597</sup> described the second defendant is a cooperative company limited holding license by the Cooperative Act for passenger service. The second defendant lends the first defendant by his or her taxi car with trademark on it for the daily service as in objectives. This case is in term of a straw man for the first defendant as his or her juristic person agent. When, the first defendant is driven with negligence by crashing the other car, the second defendant is offence jointly liable for the first defendant by offensive ground under the relative law.

The Supreme Court, Decision No. 2001/2537<sup>598</sup> described the third defendant is a cooperative company limited owning the motor tricycle service (Tuk-Tuk service car) as well as supporting the motor tricycle professional career of the service driver. The daily service of the first defendant driving the car lent by the third defendant is in term of a straw man for the first defendant as the juristic person agent of the third defendant. Any damage caused by the first defendant under the Civil and Commercial Code Section 821, the third defendant as the principal is no doubt jointly liable for the first defendant's action under Civil and Commercial Code, Section 427 and Section 821.

The Supreme Court Decision No. 718/2543<sup>599</sup> described the companies as both the first and the second defendants are goods transportation company and are filed in the claims of loss. Both of the defendants (the first and the second) have loaded the merchandises on carrier to Bangkok seaport from Singapore seaport. Under the Carriage of Goods by Sea Act, B.E. 2534 (1991) Section 39 para 2 and Section 40

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<sup>597</sup> See The Supreme Court, Decision No. 944/2536, Thai Language Version, ([http:// www.deka.in.th/view-95628.html](http://www.deka.in.th/view-95628.html))

<sup>598</sup> See The Supreme Court, Decision No. 2001/2537, Thai Language Version, (<http://www.deka.in.th/view-6397.html>)

<sup>599</sup> See The Supreme Court, Decision No. 718/2543, Thai Language Version, (<http://www.deka.in.th/view-91269.html>)

(3)<sup>600</sup>, the disputed goods are under the duty of the first and the second defendants till the destined goods are taken over by the seaport authority of Thailand. Before, the goods on the carrier had been disembarked, the third defendant as the juristic person agent of the carriage owner requested to hire the crane for the unloading shown by the payment bills of service. The task achieved by the Thai seaport authority is as the juristic person agent of the first and the second defendants. It was found that the torn sling for loading goods caused to damage of the unloading goods from the carrier which was during the task of the first and the second defendants who are jointly liable for the authority's action without offence of the crane operator at the seaport authority. This is not covered by liability of the goods transporter under Section 52 (13)<sup>601</sup>.

From the above sample, the duty operated by the juristic person agent of the juristic person who performs transportation of the passenger or goods for the destined seaport authority is all performances on behalf of the principal as the juristic person with objectives and duty of the major part. When the juristic person agent is charged by the offences of any damages, it is questionable if he or she is liable under Section 76<sup>602</sup>.

Since, the provision of the principal's liability of an offence under Section 427, it is also associated with an application of Section 425 and Section 426<sup>603</sup>

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<sup>600</sup> Carriage of Goods by Sea Act, B.E. 2534 (1991)

Section 39 para 2 For the purposes of this Section, the Carrier is deemed to have custody of the Goods from the time when he has received the Goods at the port of loading from the Shipper or his agent, or from an officer or any other person to whom, pursuant to the law or regulations applicable at the port of loading, the Shipper must hand over the Goods for shipment and until the time when the Carrier has delivered the Goods at the port of destination, or the place agreed upon to be the destination, as stipulated in Section 40.

Section 40 (3) when the Carrier has handed over the Goods to an official or to any other person to whom, pursuant to law or regulations applicable at the port of destination, the Carrier must hand over the discharged Goods.

<sup>601</sup> Carriage of Goods by Sea Act, B.E. 2534 (1991), Section 52 (13) any other cause that is not a fault of or neglect by or privity within the knowledge of the Carrier and is not a fault of or neglect by the agents or servants or the Carrier.

<sup>602</sup> See Footnote No. 71

<sup>603</sup> Thailand Civil and Commercial Code,  
Section 425 See Footnote No. 323

by *Mutatis Mutandis* and Section 427 similar to Section 425, of which the vicarious liability is under. However, the liability is always different under Section 76 in term of the primary liability resulting on the difference between taking recourse and claiming by prescription, that is , when the vicarious liability is considered under Section 427 associated with Section 425 and Section 426, the principal (juristic person) is entitled to take recourse in full amount under Section 426 since the concept is clung to the principal (juristic person) does not act directly but take part in indemnifying to others for a person whose status is as the juristic person agent authorized by the principal while the juristic person's liability under Section 76, the juristic person is liable for “the authorized person's action”. Therefore, taking recourse cannot be considered directly but rather the case if “the authorized person” is liable to the juristic person in any offences.

The author has discussed on the prescription of the entitlement to take recourse. Since, the juristic person holds the rights to take recourse from the offensive agent, the offence under Section 427 allows doing it by Section 426 providing taking recourse by the employer from the employee by *Mutatis Mutandis* in ten years-time by Section 193/30<sup>604</sup>. Taking recourse from the authorized person is not specific but it is considered on the written instrument stating the duration of the prescription. For example, if the infringement is charged accordingly by the contract under Section 812<sup>605</sup>, the duration of the prescription is not stated by law in particular but not limited to ten years-time by Section 193/30. On the other hand, if the claims are plead on the

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Section 426 The employer who has made compensation to a third person for a wrongful act committed by his employee is entitled to reimbursement from such employee.

Section 427 The two foregoing sections shall apply *mutatis mutandis* to principal and agent.

<sup>604</sup> Thailand Civil and Commercial Code, Section 193/30 The period of prescription for which no other period is provided by law is ten years.

<sup>605</sup> Thailand Civil and Commercial Code, Section 812 The agent is liable for any injury resulting from his negligence or non-execution of agency, or from an act done without or in excess of authority.

authorized person who acts some offences against the juristic person, Section 448<sup>606</sup> is required for the action of the prescription in making compensation (one year counting from the recognisable victim against the offence and the actor who is engaged to pay for compensation or ten years counting from the ground charge).

Even though, the liability under Section 76 and Section 427 is different from its purpose or principle, the juristic person's liability for the juristic person agent's actions of any offences as the authorized person at the same time requires the juristic person's liability as the principal for any offences in term of the vicarious liability (For the juristic person agent of its own) under Section 427 added by of the primary liability under Section 76. It may be considered as 2 different offences of which its nature is in common when the juristic person agent or the authorized person are in the status of employee of the juristic person discussed and an offence of the infringement against the contract, although its nature and the principle of both cases (liability under Section 76 and Section 427) are different in application. It is not suggested that Section 427 which is a relative law to Section 76 is a general provision since the legislator tends to make obligation for the principal's liability. Therefore, it is not a designated law for the juristic person's liability in particular way. The investigation is recommended to investigate if the representative is as the authorized person who performs to achieve the major part in objectives of the juristic person under Section 76.

From evidence of the adjudication by the court, the Supreme Court, Decision No. 243/2530<sup>607</sup> (a juristic person agent who drives a taxi car for service of

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<sup>606</sup> Thailand Civil and Commercial Code, Section 448 The claim for damages arising from wrongful act is barred by prescription after one year from the day when the wrongful act and the person bound to make compensation became known to the injured person, or ten years from the day when the wrongful act was committed.

However, if the damages are claimed on account of an act punishable under the criminal law for which a longer prescription is provided such longer prescription shall apply.

<sup>607</sup> See Footnote No. 584

passenger on behalf of a company as the third defendant who runs the passenger car service), the Supreme Court, Decision No. 3147/2532<sup>608</sup> (a cooperative as the third defendant is in term of a straw man for the first defendant who drives to transport passenger when the adjudication is not clarified enough into its objectives but it is only obvious that the second defendant drives to transport passenger on behalf of the taxi service cooperative of the third defendant and pays for a fee for hiring a vehicle with the trademark on it), the Supreme Court, Decision No. 4771/2533<sup>609</sup> (the first defendant is the juristic person agent of the limited company and the first defendant drives a service car for transporting passenger on behalf of the second defendant who performs duty as in objectives registered by the second defendant) and the Supreme Court, Decision No. 944/2536<sup>610</sup> (the first defendant is the juristic person agent of the cooperative as the second defendant who drives a vehicle to transport passenger by objectives of the defendant). They are all observed that all juristic person agents perform duty which is a major part, the transportation is achieved by objectives of the juristic person even though they are a straw man. In consequence, they are as “the authorized person on behalf of the juristic person”, the juristic person shall be liable under Section 76 which may be useful for the victim.

However, if the victim pleads claims on the juristic person’s liability as only the principal under Section 427, it may help the victim for the treatment of indemnity in another way.

Therefore, in the case that the juristic person agent is also “the authorized person on behalf of the juristic person”, the juristic person’s liability shall be applied by Section 76 due to the authorization of such person. Even though, an application of Section 427 associated with Section 425 and Section 426 are required for the principal’s liability for the juristic person agent’s actions. On the contrary, such

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<sup>608</sup> See Footnote No. 585

<sup>609</sup> See Footnote No. 586

<sup>610</sup> See Footnote No. 587

status which is not a major part by objectives shall be applied by Section 427, not Section 76.

The characteristics of how the action according to the duty of a representative or an authorized person on behalf of juristic person is, the law does not explicitly legislate that how the action according to the duty characterises. To find the meaning of the action according to the duty will have to search from the judgment of the court which the court always rules by using the principle of liability of the employer in violating to the employee under the Civil and Commercial Code. By this way, the judgment of the court is based on legal opinion that how the action according to the duty of a representative or an authorized person on behalf of the juristic person as same as the action of employment. Also, many academics agree in correspondent with to bring the principle of consideration of employment to compare the ruling.

With the liability for violation caused by the action of the employer is the liability called as the liability for the action of other persons (Vicarious liability), which refers to the liability of a person in violating to another person by that person is not liable for the violation itself. It is an offense that the liable person will not act intentionally or carelessness or take part in the liability. It is liable that the damage party does not have to prove the guilty of the person to be liable due to the law is considered that the liable person has been involved in causing the damage, and to let the damage party will have to be obliged in proving the fact is difficult and may cause the unfairness. The law has assumed that such person is liable even without action of violation of such person.

In addition, the legal principle of liability for the action of another person is more accepted in the British Law. By theory, it explains to the employer to be liable even if it is not due to its fault according to the theory of liability base on fault because the way which the employer has authority to control over the employee and the employer has to be careful in selecting the employees, and the social reason that the employer is liable for those involved in the occurring damage. As the Civil and

Commercial Code, Section 425 which the lawyers have explained that the job which the employee does according to legal relationship between the employee and the employer. This is the job of the employer and the employer is the recipient of such job. Accordingly, if the employee has made the violation, the employer will also have to get such result by being liable for the consequence of violation by the employee has made to the employment. By this way, the liability is the jointly liable along with the employee under Section 291. But, the employer has the right to request exhaustively for compensation from the employee later. When the employer has owned the job and gets the job result, there are many reasons that the employer will have to be liable because the employer is the controller, selects and trusts the employee. If the employee behaves badly, the employer has the right to discharge it. The employee will have to comply with the order with these reasons, if the employee has made the violation, the employer will also have to get its result.

Concerning the matter of performing the duty under employment, the Japanese Civil Code, Article 715<sup>611</sup> and the German Civil Code BGB, Section 831<sup>612</sup> as the original source of the provision of Section 425, identifies that if the employer has used reasonable care in hiring the employee and supervising such job or work or such loss or damage will be occurred in spite of taking reasonable care, the employer is not

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<sup>611</sup> Japanese Civil Code, Article 715

(1) A person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employee or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care.

(2) A person who supervises the business on behalf of the employer shall also assume the liability under the preceding paragraph.

(3) The provisions of the preceding two paragraphs shall not preclude the employer or supervisor from exercising their right to obtain reimbursement against the employee.

<sup>612</sup> German Civil Code BGB, Section 831

(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.

(2) The same responsibility is borne by a person who assumes the performance of one of the transactions specified in subsection (1) sentence 2 for the principal by contract.

liable. But, the British Court does not consider that good control of employee is an excuse to get rid of liability. By the way, Thai law has cut off that cause is not being liable because of good control. Still, the employer is liable for the result of violation by the employee's action of employment, absolutely. The employer will not refer to claim that good control to be cause for exception of liability.

In relation to the legal concept base of determination to let the employer is liable at the relation base in the legal relationship according to the hiring contract between the employer and the employee as the key point. By this way, in consideration whether the employer is liable or not, it is considered that such violated action is in term of violation of employment or not being the main point. The issue is how to consider that it is the case of the employee violates such employment, it will need to consider the opinions of academics attributing the court judgment.

The academics recommend that in case of the employee violates the employment, it refers to the action that the employee has performed for the hiring job success and the existing cause is the result of such work practice, not only the existing cause in a period when the employee is performing the hiring job. Thus, even it is during the period that the employee is performing, it is not always still the action that violates the employment. It is important to consider whether such violation is the result of performing in duty or not. If the employee has violated as the result of its performing, the method of employee's performing is the method with intentional violation, carelessness, un-honesty for personal result of the employee or by violating the employer's order, it is not the performing method. But, it is still the violation of performing in duty and it is also considered as the action of employment itself. It is the malpractice method which is the matter between the employer and the employee. This does not let the employer be away from liability for violation of the employee. Also, in performing the assigned duty is not limited of employment agreement. If the employer

orders to perform the other duties in addition to assigned duty and the employee agrees to perform, it is considered to be assigned to do as well.

The important criteria to be considered is starting whether it is the action of employment or not, the academics have explained as criteria that it will have to consider the relationship between the action that causes the damage to the duty by checking from the condition of job and the violation that is to check whether the existing cause is the result of performing or not. The French Court has ruled by applying the relationship between the action that causes the damage to the duty, if such action is not related to the performing of duty, it is not called as the action on duty such as a car driver has collapsed with an other car and there is an argument that who is right or wrong, then the car driver punches the other driver, the employer is not liable for the violation of a driver punching with such other driver because it is not related to the performing on duty.

Thus, in consideration of characteristics of the action on duty of employment will have to consider the relationship between the actions that cause damage to the duty as well.

The decisional case studies on the action of violation of employment, such as;

Firstly, while performing the duty according to the employment contract such as in case of hiring to drive the shuttle car service for personnel and it has driven to hit the others during on duty or in case of a professional technician who is employed by a company which does the business centre for repairing the cars. When the employee has seen the installation of spring brace and brake in the wrong method but misconducting to correct. This is the cause to let the customer car's brake is broken and collapsed at the sideway and damaged, and the customer has been seriously injured. It is regard as the carelessness without carefulness as the professional technician will have to conduct. It is considered as the violation of the employment of the company. The company is jointly liable with the employee on the result of occurring violation or the

second defendant, who is a business entrepreneur of freight containers and hired by the first defendant to bring the containers of the plaintiff for packing at the plant of the first defendant. The second defendant has driven the truck to park at inside the plant of the first defendant. Then, he has released the braced leg of the truck's trailer which carries the containers and releases the unlocking between the dragged head and dragged tail trucks.

When the area where to place the dragged tail is the slope ground. This lets the end of the dragged tail which support the weight with the wheel is higher than the front, but the second defendant does not take the iron in similar to the table which brings along with the car to put and support the weight of the containers on the dragged tail for strong support. The containers of the plaintiff have fell down. Then and it is caused by the carelessness of the second defendant. The defendants will have to be liable in the case of its employee perform of employment or another sample, an employee of a gas station's owner has seen the people throwing the cigarette butts and still filling the benzene in such area. This causes the fire to get damage on the customer's car, etc.

Secondly, as performing the other duties as assigned such as an employee to act as a car steersman, but his employer also lets him drive. When hitting driving is occurred, it is regard as the violation and the employer will have to be liable. Or for an example, if a company's employee in a position to control the production process, but he has been assigned to inspect the quality of the product. When the quality of product approved for sale to customers is low, it causes the customers to get damage. The company will have to be liable because it is regard as it is the action on duty of employment as assigned.

Thirdly, as performing such other duties continuing with action on duty to get the job done successful such as an employee as a bus driver has found the broken brake and brings it for repairing, and get the repaired bus to drive until hitting the others.

Fourthly, as performing the duty as assigned according to the employment contract, but disobeying the employer's order such as an employee repairs the car machine and brings the car to take out the machine in spite of having the rule for prohibition. When such employee takes a drive out and hits the others.

Even, it is the violation of order or rule, the employer will have to be liable. Or for an example, cases of manager, financial staff and Bangkok bank clerk appointed or assigned to be the committee for counting and keeping the daily cashes. If all three employees violate the rules or orders of the bank as defined, that is, it is not locked the three safe keys, the door is not secured of shutting, the keys are not kept with their own all the time. The violation of such rules and regulations are considered as the carelessness causing the cash is stolen by the thieves in the safe. This let cause to get no money to customers at the occurring bank branch enough for the number of customers withdrawing the money and causes the damage to customers and the bank. The bank will have to be liable for such action.

Fifthly, as performing the duty as assigned according to the employment contract, but turning to do its own business and it does not leave the job or make a serious offense such as an employee assigned to drive and keep the car. But, such employee brings the car for personal business and the employer does not know. He drives and hit the others, this is regarded as the employment. Or a case of an employee drives a truck for taking the stones or earth of the defendant contractor, as a break at noon, such employee drives the defendant's truck away from the path of construction for eating out, the truck hit a motorcycle which the plaintiff sits on, carelessly. Concerning such employee brings the defendant's truck to drive, even it will violate the rule of the defendant's company but it is the period during the employee work under the employment of the defendant's company throughout the day. It is regarded as the violation to the plaintiff in the employment of the defendant. The defendant's company will be liable.

Sixthly, as performing the duty as assigned according to the employment contract, but turning to do its own business and it does not leave the job or make a serious offense to violate the employer. It is not regard as the employment such as an employee driving a car for doing the employer's personal business, but then he changes his mind and abandons the job and drives a car hitting the others, or as an employee of the employer. He drives the car for rent of his employer and he has conspired with a friend that his friend will rent a car not too far and the employer allows him to drive. But, such employee drives the car to other provinces and causes to hit the other car on the way.

By this way, even if such employee will drive his employer's car for employment before, but this time he has lied to use the car. It is regarded to violate the employer. When it violates the employer, the employer will not be liable, it is considered as the action in addition to the work etc. In relation to considering whether turning to do its own business and it does not leave the job or make a serious offense to violate the employer or not, it is likely considered whether if the employer knows the matter and makes a serious offense by dismissing as a criterion or not and finally, it is not as performing the duty such as an employee as a driver, after work he has taken the key hanging in routine practice and he brings the car for travelling, arbitrarily, until it causes the car to get hitting. This is not regarded as the employee has violated the employment.

In conclusion, it is evident under the criminal cases mentioned above are the actions of employment, they are off-duty actions and not the employment. If it will bring the guidelines for considering the action of employment adapted for use in ruling the liability of the juristic person due to the actions of the representative or the authorized representative under Section 76, which any case it will be considered as "action on duty" of a representative or an authorized representative of the juristic person that the juristic person will be liable. The author recommends that the theory of liability for the actions of others (Vicarious liability) and it is the liability because of involvement. (Contributory liability) will be additionally studied for support as follows;

For theoretical concepts associated with the liability that a person must have the guilty and liability that such person shall not be guilty, they are shown as; “in principle, a person that has to be liable for violation, it will have guilty of violation of its own. Then, a person who does the violation and the liability is the same person which endorsed with the principle and rationale. Thus, the liability in the action of violation itself is the liability that desires the guilty or called as Subjective Responsibility. However, with the law development if such principle is used, even a person who violates is guilty and it is liable to pay the compensation to the victims. But, a person who violates may not be in a position to pay the compensation for damage to the damaged person. This lets the damaged person be not healed and be injustice to the damaged person. It creates the idea to let the other persons who are associated with some matters with a person who violates is jointly liable or on behalf of a person who violates. This creates the idea of principle of liability without guilty or called as Objective Responsibility and it lets a person who violates and a person who will be liable are different ones.”

In addition, it is able to extendedly elaborate on the liability for the violation of the employer which is liable called as Objective Responsibility that the characteristics of this liability occurs in 2 types: direct liability (Direct Responsibility) which is the liability of the employer occurring as soon as the employee violated without the opportunity for the employer to prove otherwise (which is the characteristics of the liability under the Civil and Commercial Code, Section 425) and indirect liability (Indirect Responsibility) which is the liability of the employer because the selection of employees is not good by the employer including poor caring for the employees which open the opportunity to let the employer to prove that it is not liable because the selection of employees is good.

The theoretical principle about Objective Responsibility or known as Secondary liability has been brought up to describe the liability of internet service providers which will be liable due to the violation of trademark, copyright and patent

caused by the actions of the internet users both it does not violate the direct violation in manner of Subjective Responsibility.

The explanation of liability called as Secondary liability by extendedly elaboration from the trial of the United States Court, this Secondary liability is the action of indirect violation (Infringement) which will be brought up to mention, when anyone more get involves or materially contributes to facilitate, induce or otherwise, responsible for the violation committed by another person directly. In the United States, there will be the law which places the rules on Secondary liability as the law in matters of patents, trademarks, copyrights. However, concerning the copyright, there has been developed a singular example of legal case separated by the court rulings. By this way, the court who is develops the theoretical principle and policies relating to such Secondary liability since from the beginning.

In general, this type of Secondary liability divided into 2 types which have been developed by the court. Firstly, it is liable for the action of others (Vicarious liability) and secondly, the liability because of having participated (Contributory liability). Although, the dividing line between the 2 types of liability is still unclear. But, the first significant condition for recording in form of Secondary liability that is the action of violation is a basis for liability.

The liability for the action of others (Vicarious liability) is a theory of liability which has been widely accepted as a basic form of liability in case of copyright infringement. The basic idea of liability for the action of others has been developed extendedly due to the legal principle of Common Law's representative. It is a basic idea called as *Respondeat Superior* (the responsibility of the master for the action of its subordinates). According to this theory, the court accepts that the employer should be liable for the violation of its employees under the Master-Servant principle. By the court, has extended the liability to the person who gets the benefit from the violation. When a company or enterprise has the right or ability to prevent the action of violation. The

court has judged a case of *Dreamland Ball Room v. Shapiro, Bernstein & Co.*<sup>613</sup>, that who owns the hall, a station where to show, dance by using the music is written by having the copyright and it is the violation of such copyright. It will have to be liable.

By this way, the owner will be liable if this show existed for the profit or desired benefit to the owner of such hall and even the music band employed will be made under the contract to perform independently to the person who has made the contract.

The Contributory liability has been widely defined that it is the form of liability of a person who has not committed to direct infringement but has been participated in action of violation to the other persons. Whether, it is to get involved as a key factor in helping to commit such violation (let make it easier to get the occurring violation) including to get to know such action as infringement itself. Both factors are the key elements for liability because of involvement.

The liability because of involvement (Contributory liability) is a basis of the liability theory for violation of the company business (Tort theory of enterprise liability). The liability because of their involvements (Contributory liability) to the third person will be liable for the violation that has been made initially on the idea basis of relationship of the third person with the action of such damage. For example, by promoting to propose the action or get the benefit of such action. Therefore, for the case of liability due to having participation (Contributory liability) is consisted of 2 conditions: First is perception of the tort of that person and second is participation in support or assistance of such person or participation with such violation. Such

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<sup>613</sup> *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, The owner of a dance hall at whose place copyrighted musical compositions are played in violation of the rights of the copyright holder is liable, if the playing be for the profit of the proprietor of the dance hall. And this is so even though the orchestra be employed under a contract that would ordinarily make it an independent contractor.” By contrast, courts did not extend liability to landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in organizing or soliciting the infringing activity.

perception may be actual perception “Actual knowledge” or significant perception “Constructive knowledge”.

This condition of such perception if considering in case of liability for the action of the others and it has found that the perception condition is not a key element in case of liability for the action of others. As it is a key element in case of liability because of participation. (Contributory liability).

What the Constructive knowledge is? Black’s law dictionary defines that “if anyone should get to know any fact. Those persons shall be deemed to have been perceived such fact. In other words, the person does not perceive the actual fact but it should know. It is also the legal criteria developed by the court which such person does not perceive because it does not pay attention or under the circumstances, it should be perceived such as having the information is visibly appeared.”

However, when considering the above theoretical principle, the author recommends that both liability which is the liability for the action of others (Vicarious liability) and liability because of participation (Contributory liability), which has the characteristics of being the liability of the third person for the action of another person is from a key basis of concept together that is concerning the relationship of the third person with such action of damage. Especially, to benefit from the action of such violation.

Therefore, in considering the liability for the action itself (The liability for the action committed by a representative or an authorized representative). In order to answer the problem whether the juristic person will have to be responsible for the action of its representative or authorized representative or not. It should bring the concept of benefit as a key criterion in considering the characteristics of the action on duty of a representative or an authorized person on behalf of.

### 4.3.2 Comparison Legal Principles and the Punishments for Corporate Criminal Liability both Common and Civil Law Systems

#### 4.3.2.1 Thailand

Consider the working on duty in violation of regulation, rule or order of the juristic person in Thailand can be explained that; In this matter, if it is the guideline for considering the characteristics of the action on duty which the court has applied to rule of the liability of the governmental agencies in cases of the state officials violating before the applicable law is effective of the liability for Wrongful Acts of Officials, B.E. 2539 (A.D. 1996)<sup>614</sup>. The court has ruled based on the guideline concept of Section 76<sup>615</sup>, but by the comparison of the ruling criteria in matter of employment. The court considers that in some cases, the official as an authorized person has acted in its duty, but it neglects some steps according to the agency's regulation specified. If the action violating such regulation is still the action on duty and has acted for the benefit of the agency. Although, the official violates the another person at that time, the court considers in this case is the action on duty, as shown by the following Supreme Court Decision.

The Supreme Court, Decision No. 4437/2530<sup>616</sup> described that the police superior ordered its subordinate to take the car out of the area without prior approval. Despite, it was the violation of the regulation placed, when hearing that the police ordered to take the car out of the area was not the personal business but for official duty. Thus, when the driving staff violated, it was considered for the violation of the officer occurring during the official duties of the police officer. This resulted to the police department will have to be liable.

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<sup>614</sup> See Footnote No. 538

<sup>615</sup> See Footnote No. 71

<sup>616</sup> See Supreme Court, Decision No. 4437/2530, Thai language version (<http://www.deka.in.th/view-26755.html>)

The Supreme Court, Decision No. 1127/2505<sup>617</sup> described that the military officer drove the car in official duty. Despite, it will violate the regulation of the ministry which prohibits the commissioned officer to drive itself. This regulation is an internal matter between each other, when such military officer violates as working on duty and causing the other persons get damage, the Affiliated Ministry, Department and Division must be liable as well.

The Supreme Court, Decision No. 2291/2534<sup>618</sup> described that Thor, a defendant's bank accountant had the duty to check up the documents of the applicant who opened the account according to the defendant's regulation (Vor), and it brings the evidences of copies of identification card and house registration of the plaintiff to open the current account by using the plaintiff's name, which if examined only an original or a copy of identification card and house registration which appeared the picture of the identification card's owner, completely, it must well know that the applicant, the person who opened such account was not the plaintiff. By this way, concerning Thor has approved to let the person open the current account without asking for checking up the evidence of the applicant under the regulation and orders to pay the cheque in name of the plaintiff, this lets the plaintiff is filed as the criminal case. The action of Thor is considered to violate over the plaintiff. The plaintiff has been damaged when Thor's acts in term of the defendant's employment. The defendant will have to be jointly liable for the results of such infringement.

Besides, it can discuss that, the reception of western law in Thailand started in the reign of His Majesty the King Chulalongkorn or King Rama V. His majesty kindly gave advice to arrange the Civil law to be used as same as in the local areas of Europe. In consequence, Thailand selected to manage the codification by starting to create the Penal Code until the declaration of its enforcement called "the

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<sup>617</sup> See Supreme Court, Decision No. 1127/2505, Thai language version (<http://www.deka.in.th/view-45525.html>)

<sup>618</sup> See Supreme Court, Decision No. 2291/2534, Thai language version (<http://www.deka.in.th/view-17972.html>)

Penal Code of Siam R.S. 127” from 21st September R.S. 127 or B.E. 2451. As a result, the Penal Code of Siam R.S. 127 has become the first code law of Thailand and has resulted in other codes and the other laws enforcement, for example, the Civil and Commercial Code, the Civil Procedure Code, the Criminal Procedure Code, etc.

On the other hand, after the enactment of the Penal Code R.S. 127 and the other codes, Thailand has encountered many amendments of laws or in other words, the problem of juristic method. Due to, the reception of western law of Thailand or the Civil law, in the reign of King Rama V, the influence of English Common law had been taught in the laws school of His Royal Highness Krom Luang Ratchaburi Direkrit, the minister of Ministry of Justice, the school founder and the teacher. He had applied the English law principle to use in the criminal laws.

Therefore, Thailand had applied the Common law as its own laws for a long time before changing to Civil law. The adaptation of Thai laws, consequently, become mixing without the consideration of juristic method. The study on law problem by juristic method helps us to understand the problem clearly and will lead to the right solution process.

Georges Padoux, the French chairman of the bill of Penal Code R.S. 127 was very worried in the incorrect juristic method issue; therefore, he wrote his opinion about the law education and presented to His Royal Highness Svastivatana Visishta during, the Minister of Financial Ministry during the reign of King Rama VI. His Royal Highness respectfully informed the King, “...Monsieur Padoux asked me to consider the study on the juristic method that this is the time for His Majesty to kindly rearrange the content of the Civil laws. Due to, the errors of the 2 methods, when the government would like to do the enactment of this Civil laws but the judge is not sufficiently proficient to use that method accurately for their judgment, it causes the uneasiness to the court of justice...” in the reign of His Majesty the King Vajiravudh or King Rama VI. Therefore, he wrote the rescript no. 35/753 dated on 18 March B.E. 2456, “...as in agreement to the suggestion of Monsieur Padoux which contains reasonable details, it is true that I studied laws from England but I feel that our country has come to the agreement to use the Civil laws.

In consequence, it is appropriate for me to reorder the education for the highest benefit in the use of laws. With this reason, I allow you to make a plan in accordance with Monsieur Padoux's view and with our conversation...". According to, the criminal liability of the juristic person, it can be described the criminal liability of the juristic person in Thailand is not clear which case is guilty and how the punishment comes into effect when being guilty. However, this problem can be described in the following one example of the juristic method issue in Thailand which will be explained in the following topic. To conclude, this problem comprises of 2 major topics which are connected in terms of the criminal liability of the juristic person that the penalty should be direct to it if it is found guilty.

The first topic is the criminal liability of the juristic person. Sukrirat (2010) stated to enforce the laws about the criminal liability of the juristic person in Thailand has not been clear, that for which case it must be offended and if it confessed how the punishment will turn out, for example. When considering the complication of how could it be offended, this directs to its intention. The Supreme Court Judgment No 787/2506, reviewed at the general meeting No. 6/2506 about the criminal liability of the juristic person if it must be offended in some cases according to the Penal Code or it must not, "...the Supreme Court in the general meeting agrees that the intention of the juristic person must be represented through its representative. In accordance with the Civil and Commercial Code, Section 75 (or the present Civil and Commercial Code Section 70, paragraph 2 – the author), when the representative demonstrates any intention under his or her duty during the mission of the juristic person that intention will attach to the juristic person and it will be regarded as its intention.

Therefore, the juristic person may intend to commit the criminal act and commit the act already, it must be punished according to the laws enforcement. The offence must be considered from its characteristic, the conduct and the authority of the representative with the purpose of each juristic person. For this case, it can be seen that Mr. Boonpen, the defendant, committed the act to trade drugs which is the objective of his partnership and for the commercial benefit of his partnership; therefore, it was regarded as the intention of his partnership as well. His partnership must commit its criminal liability as same as Mr. Boonpen. The judgment accused that Thonburi Oasot

Registered Ordinary Partnership was guilty under the Penal Code, Section 237 but the punishment in accordance with the Penal Code, Section 274 to reduce the imprisonment, fined the partnership, the defendant, for THB 2,000 and confiscated the exhibit as in the judgment from the Appeal Court.” The judgment results in the unclear message to understand which case the juristic person must be offended because when it “...must be considered from its characteristic, the conduct and the authority of the representative with the purpose of each juristic person...” as aforementioned.

The second topic is offence committed by negligence; the Supreme Court Judgment, No. 787/2506 considered the criminal liability of the juristic person in the case that the offence was committed by negligence causing to the death of the other with the imprisonment and fine according to the Penal Code Section 291, “...the Supreme Court regarded that the part of this incident result came from the first defendant’s act (who are the juristic person- the author), which did not cause by the negligence of Mr. Suthan, the gas truck driver, alone as the two plaintiffs had claimed. Because if the first defendant respected the Ministerial Regulations and the Announcement of the Department of Public Works and Town & Country Planning on the regulations & gas tank installment and type and elements in the gas tank, issued no. 4 (B.E. 2529). In addition, these regulations had enforced the owner or the possessor adjusts its gas truck within 365 days from 19th August B.E. 2529, the date of the laws enforcement. However, the first defendant did not follow the disciplines and still used the truck until the incident, for 3 years. The action of the first defendant (who is the juristic person – the author) was regarded as the negligence, which the first defendant who owns gas trade and delivery that belongs to the flammable and hazardous substance. Regarding to the general vision and the behavior of the business owner as the first defendant, the owner must take care of this issue specifically than the other business types because if neglecting, it will cause fatal danger to life and properties of the others who are not relate to them as same as in this case. Therefore, the action of the first defendant committed the crime as complained...”.

Nonetheless, this judgment causes the confusion of the negligence of the juristic person about which law should be applied to connect the action between “the representative of the juristic person” and “the juristic person”, owing to the fact that

for the offence with intention, the Supreme Court will depend on the Civil and Commercial Code, Section 70, paragraph 2 but for the offence by negligence, there is no laws support the consideration of the Supreme Court.

When considering in the criminal punishment for the juristic person in case of being offended, it can explain that if any juristic person commits the criminal liability, which punishment is suitable for them? When the enforcement of the criminal liability of the juristic person in Thailand is unclear to explain about how to be offended as aforementioned, the following problem is how it will be punished with the same objectives as the punishment for the natural person. If considering the Supreme Court Judgment, No. 747-784/2506 from the general meeting as aforementioned, the court has drafted the principle idea in this issued, "...the juristic person who may be accused must consists of intention and the unlawful act will be accused with the criminal punishment as the laws allow doing so..." The problem occurs in some cases which the court cannot find the stated punishments for the negligence case. The example is the Supreme Court Judgment No. 3496/2537; the court judged that the juristic person must be offended by its negligence which caused the death of the others. The court held on the punishment according to the Penal Code, Section 291, the severest punishment. Regarding the Penal Code, Section 90, the punishment for the first defendant (who is the juristic person - the author) was fined THB 20,000 with the imprisonment was suspended for 3 years according to the Penal Code, Section 56. Although the section accuses with the imprisonment and fine, the Supreme court is able to punish as possible which means to fine only even the laws has regulated to imprison and to fine.

Similarly, when considering the other aspect, the opinion about the criminal liability of the juristic person. The consideration on the objectives of having the juristic person is a major factor because the person in the society must constitute of movement and change in accordance with the natural mainstream or the cycle of the world or the uncertainty of everything. These must be adjusted to the condition of that person and every person has different condition depending on the environment.

Furthermore, during their lifetime in the society, there are physical and mental activities and the situation related because one's life is not stable but it needs to

be developed for the progress and the highest benefit which he could possibly have. With these reasons, to do some activities may require a group of persons to brainstorm ideas and skill for example, funding idea, specific skill or workers. The group of people will increase the possibility of success.

Consequently, to gather people for the unity is the group of people and constitute an artificial person or called “the juristic person”. Therefore, the juristic person is similar to the natural person who owns the right and duty. It can be concluded to constitute the juristic person with the purpose of facility in doing activities or business requires the people to increase the competencies in the business development in order to follow the change and the modernity of the world today.

In addition, the analysis on the offence of the juristic person, to consider its condition is the another significant factor. The theory about the corporate entity relates to the realistic theory which can be adapted for the analysis.

Orom (2010) mentioned that the realistic theory is the theory which regards the condition of the juristic person as the realistic state which is accepted in the society in its true individuality or differing from the natural persons who gather to be the juristic person. The laws just certify only the existence of the legal person. As a result, the juristic person can have intention which will be demonstrated via the natural person and the action of the representative will be always similar to the action of the juristic person, due to the fact that the representative is the organ of the juristic person. Gierke and Meailand, the German jurists, supported this theory.

Likewise, the fiction theory is significant as Harris (2014) explained that the fiction theory is the idea which regards the juristic person is constituted from the legal confirmation and it is treated as if it was a person. The law particularly creates or makes it up to allow it owns the right and duty as same as the natural person. With these reasons, the right and duty of the juristic person regarding to the theory are only limited by the law. The significant person who supports this theory is Savigny, a German jurist.

Moreover, Perrier (2014) explained that according to the Civil laws, “person”, the natural person or legal person is the subject of the right of the Civil laws.

The beginning of being a person is the capacity to hold right or duty. The Civil laws accept the juristic person as same as the natural person. For the right and duty of the legal person according to the fiction theory, it owns the right and duty as the laws regulated because the law is able to offer or abolish the state of being the legal person anytime. On the other hand, the realistic theory sees the juristic person that it exists and the laws just confirm its status. So, only the law controls them by regulating right and duty.

Thus, to explain any theory about the right and duty of the juristic person according to the laws. The juristic person is the subject of the right as same as the natural person and are able to own the right and duty. In terms of Thai law, the state of being the juristic person is in accordance with the fiction theory, it is describing that the legal person will exist by the authority of law, which means the law creates its existence.

Regarding to the Civil and Commercial Code, Section 65, it states that the juristic person can exist according to the power of code laws or the other laws. In general, the criteria and the elements to constitute the juristic person are composed of objectives, scope of its authority, the representative, duty and responsibility of the representative, having capital or properties, the continuity of the business and location which are certified or authorized by operation of law. Similarly, when we consider the principle of the Common Law used in the United State of America, it was found that US has given priority to the consideration of the legal person types in the judgment of criminal case. The juristic person is divided into many forms depending on the constitution or the laws and the characteristic of the related persons as these followings.

The first type is the juristic person under Private Law. Generally, the juristic person under Private Law means the legal person under the enforcement of the private law, a group of people for the operation. Each country has different classification of legal persons, for instance in Germany, the Bürgerliches Gesetzbuch or BGB12 divided the juristic person into 2 types which are Association or Verin as the first type. Regarding to BGB, it also can be divided into sub-types which are 1) Ideaverein, the association with non-trading purpose and gain the status when registering with Local Amtsgericht, 2) Wirtschaftlicher Verein, authorized by

Administrative Authority only, and 3) the Associations in foreign countries which are authorized by Federal Minister of the Interior only. The second type is Foundation or Stiftung which are the assets donated by people who inform ones' purpose on the foundation bond and the foundation will be the juristic person when being authorized by Higher Administrative Authority. Apart from the association and the foundation, the juristic person under Private Law can be a limited company by share or Aktiengesellschaft, a company with limited liability or Gesellschaft mit beschränkter Haftung.

Comparing to the consideration of the legal person in Thailand, it was found that the juristic person whose status is similar to the private section comes from the incorporation and the registration as the laws regulated. When it gains the legally official person status, it will have the same status, same right, same duty and same punishment as the natural person. If reviewing from the process, the legal person will exploit the right and perform the duty as the private section equally. No one is superior or obligatory the authority to specify the inter relationship. The process bases on the exchange of benefit among private section. Therefore, this juristic person is called the private juristic person. Thai laws divide into 2 types which are profit-making juristic person and non-profit-making juristic person. Details are as follows: The profit-making juristic person can be divided from the purpose for profit as follows:

#### 1) According to the Civil and Commercial Code

Registered Ordinary Partnership is the juristic person in accordance with the Civil and Commercial Code, Section 1015 stating "A partnership or company, upon registration being made according to the provisions of this title, continues the juristic person distinct form the partners or shareholders of whom it is composed."

Limited Partnership is the juristic person in accordance with the Civil and Commercial Code, Section 1077 stating that the partnership is consisted of these two following. One or more partners whose liability is limited to such amount as they may respectively undertake to contribute to the partnership. One or more partners who are jointly and unlimitedly liable for all the obligations of the partnership. Hence, the

laws do not force the limited partnership to make a registration. Limited Company is the juristic person in accordance with the Civil and Commercial Code, Section 1096 that it is the group of 3 persons and up write the Memorandum of Association and Incorporate a limited company which is formed with the capital divided into shares, and the liability of the shareholders is limited to the amount, if any, unpaid on the shares respectively held by them. When it is registered, the company will be the juristic person. According to the other laws. The profit-making juristic person in accordance with the Civil and Commercial Code, there may be the other profit-making juristic person in accordance with other laws such as the Public Limited Company Act, B.E. 2535. Under Section 15 states that the Public Limited Company is the kind of company established with the purpose to offer shares for sale to the public and the liability of the shareholders is limited to not exceeding the amount payable on the shares and the company has specified such objective in its Memorandum of Association. Moreover, under Section 15, the company duly registered under this act shall become the juristic person on the date of registration by the Registrar.

Furthermore, Thailand also considers the non-profit-making juristic person which can be divided as follows:

1) According to the Civil and Commercial Code, there are;

(1) An association created for conducting any activities according to its nature. It is to be done continuously and collectively by people other than of sharing profits or incomes earned. An association must have its regulations and must be registered according to the provisions of this Code.

(2) A foundation consists of the special properties that appropriated to the purpose of the foundation and not for sharing profit.

2) According to the other laws

The juristic person in accordance with the other laws or constituted by the other laws apart from the Civil and Commercial Code might be allowed. It is generally the juristic person under Private Law. Likewise, the punishment for criminal

cases in Thailand includes the types of the other juristic person such as the juristic person under Private Law which means the legal person by laws and the laws offer it an authority. For the purpose of the constitution of the juristic person under Private Law, it is to be the administrator of public services. According to the laws, the juristic person gains special status in terms of right and the superiority over than the private person about the governance and the public authority.

Moreover, it includes the obligatory toward the common interest of public benefit which is more than the disciplines of the contract with the private section. This juristic person is regarded as the use of mass authority which is government authority, city control or public service. Therefore, the form is different in every countries for example, in Germany; the juristic person according to the German laws can be divided into 3 types as 1) *Körperschaft* means a group of people who are appointed by members of the corporation. The cooperation must include members who may be the natural person or the juristic person, for instance, members of the municipality who are the citizens in that area. There are 2 types of public corporations which are the local corporation (*Gebietkörperschaft*) meaning the government organization who gains the authority over an area, for example, the authority does not only cover the municipality but the existing people. Both are obligatory to the laws of that organization. Secondly, the personal corporation (*Persolkörperschaft*) means the organization which specifies the qualification of membership. This kind of organization will gain authority from the Private Law over its members only which is unlike the local corporation. The examples of personal corporations are the Thai Bar under the Royal Patronage and the Medical Council. 2) *Anstalt* according to the Private Law means the institute which is different from the corporation because there is no member but it is a government unit with the purpose to be the tool for one specific public operation, for instance, Public Warehouse Organization, etc. 3) *Stiftung* according to the Private Law means the unit in the form of a foundation or a government unit for a public operation, using properties as its tool for the achievement, for instance, Child Disability Foundation. In Thailand, the juristic person under the Private Law consists of several types as follows:

Regarding to the definition and the types of the aforementioned juristic person, they are elements for the judgment of the criminal liability of the juristic person. The commitment of the juristic person in Thailand and Foreign countries can be divided into the civil liability and criminal liability as follows:

The civil liability of the juristic person can be described that the laws which regulates to the criteria in the civil liability is included in the Civil and Commercial Code in terms of violation. It stated on Section 420, “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation”. Therefore, this Section 420 regulates to set up the punishment from violation which means the commitment of ones’ wrongdoing. Hence, if any person violates the others and causes them damage, that person must be responsible for his or her action. Besides, the juristic person must be responsible for the violation which relates to them. The related part is the responsibility as the employer or the main culprit in some cases. According to Section 76 of the Civil and Commercial Code, it states, “A juristic person is bound to make compensation for any damage done to the other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of its functions, saving its right of recourse against the causers of the damage. If the damage is done to the other persons by an act which is not within the scope of the object or power and duties of the juristic person, all the persons as mentioned in paragraph 1 who agreed such act or executed it, they are jointly liable to make compensation.”

The regulations in Section 76 aims to set up the principle when the juristic person respects the rules within its scope of objectives, it will regard that the offence will be abolished because the action represented and obligated to the juristic person. The example is the board of the company makes a contract with the outsider in the name of the company. The contract will connect to the company and the board of directors will survive from the offence when follow the contract. For those who must be accused from the violation, if considering from Section 420, 425, 427 and 428, the compensation from the violation causes, the two cases which are a wrongful action according to Section 420, a wrongful action by the employee of the employer according

to Section 425, a wrongful act of the representative according to Section 427 and the responsibility from the wrongful action of the employer according to Section 428.

In consequence, the responsibility of the director can be considered in 2 major cases which are the wrongful action of the entrepreneur who is not the juristic person and the wrongful action of the entrepreneur who is the juristic person. However, only the second case differs from the first one. In other words, as aforementioned, the juristic person is regarded as the friendship and as the person, but the truth is the juristic person cannot commit its own action so members must appoint “the representative”. When the representatives perform its action that the activity must certainly connect to the juristic person. Therefore, any act from the representative is the act of the juristic person and the responsibility of directors who are the juristic person in case of the violation is different from the directors who are not the juristic person.

For the offence caused by the representative, when it attaches to the juristic person, the juristic person must commit the wrongdoing and the characteristic of the offence will depend on the responsibility of each person in accordance with the Civil and Commercial Code, Section 420 and the offence by the other person of the juristic person from Section 425, 427 and 428. After reviewing the responsibility of the director in case of being offended from its own action, it can be said that this state of being the juristic person differs from the state of being a member, partner and shareholder. The legal person possesses its own right and duty as same as the natural person, including the commitment from the contract and the violation toward the other that it has done and attached to. As a result, the juristic person may have to be responsible in its own action if the action is under the scope duty and objectives (*Intra Vires*). With this case, the responsible person must be the juristic person and the director of the juristic person who is the representative has not to commit personal offence. This explanation can be reviewed from the Supreme Court Judgment, No. 803/2520 stating that the first defendant, an employee of the company, rented the car of the second defendant. The second defendant is the owner and the editor of Dara Thai newspaper where the company is the manager. The second defendant and her husband are the company’s directors. The first defendant drove this car back from delivery Dara Thai newspaper, resulting in the damage of the plaintiff by his formal violation at the

employer company. The company is the juristic person which is different from the second defendant. The second defendant has not to be responsible with the first defendant. It can be seen that the operation of the director of the juristic person and the personal relation does not remain as the employee or the representative but in the name of the juristic person. In conclusion, if the director violates the others, the juristic person must make the compensation.

On the other hand, if the director is the representative of the juristic person and commit the violation which is not included in the objectives (*Ultra Vires*) of the juristic person, members or the manager who vote for the action, including the other representatives, must collaborate for the compensation because that the activity is not relate the scope of its objectives while the juristic person who has not relate to the case do not need to be responsible in anything. As seen in the Section 76 of the Civil and Commercial Code that “A juristic person is bound to make compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the juristic person in the exercise of its functions, saving its right of recourse against the causers of the damage.”

To summarize, the juristic person must be responsible for its action according to the Civil and Commercial Code, Section 420, in case that the director of the business commits a wrongful act under the scope of the juristic person’s objectives, the director of the juristic person must be accused of violation but do not need to be responsible for the wrongdoing. The juristic person alone is the one who must be responsible the compensation for the damaged person. Nonetheless, if the director of the business commit wrongful act above from the juristic person’s objectives, the juristic person does not need to be responsible for the wrongdoing but the members who vote to support the act must be, including all the representatives who commit the act. It must be bound to make compensation (the Civil and Commercial Code, Section 76). At the same time, when we consider the offence of the director in case that the juristic person must be responsible in the violation, it can be explained that if the juristic person has performed any actions, the juristic person owns the right and duty as same as the natural person; hence, they may hire an employee or appoint the representative to do some activities. Therefore, the juristic person may be offended from the violation

when the act is under the scope of the objectives while the director who is the representative has not to be responsible for the act, due to the fact that these directors perform the act in the name of the juristic person as an employer or the principal.

However, the offence of the director in case that the juristic person is the employer, it is the case that the employee has committed the wrongful act toward the others. With this case, the juristic person must be responsible for the damaged person directly but the director has not to be responsible. Regarding the Supreme Court Judgment, No. 768/2521, it reviews that the employee of a juristic person asked the police to seize the crane of the plaintiff from the rented person of the plaintiff. Due to, the fact that the person is the debtor of the juristic person thought knowing that the crane belonged to the plaintiff, the employee still committed the act during the duty for the benefit of the juristic person. The juristic person, as the compensator according to the Section 76 and Section 451, the police is able to seize the properties under the command of their commander is not forced to be committed. Besides, considering on the offence of the director in case that the juristic person is the main culprit when appointed its representative to do the act, if the representative committed the wrongdoing, the juristic person must make compensation in accordance with the Civil and the Commercial Code, Section 427.

Nevertheless, the director who is the representative does not take any responsibility. Regarding to the Supreme Court Judgment, No. 696/2519, it reviewed that the defendant is the ordinary registered partnership and the juristic person appointed Sor. To present self as the agent to car parking which the business relates to the petroleum trade of the defendant. The defendant received the payment for the car parking from the plaintiff. When the car has been gone, the defendant must take responsibility to the plaintiff.

Similarly, the Supreme Court Judgment, No. 2452/2531 explained about the same kind of offence that a person brought the taxi car to be registered under the name of the second defendant's company with the purpose to do the delivery car. The second defendant consented to have the name attached on the car and to gain profit from this act. Therefore, the second defendant appointed the first defendant to be the

representative to do the business. The second defendant must take responsibility to the plaintiff who got the damages from the violation act of the first defendant.

Besides, the offended commitment of the juristic person who is the employer, in terms of the responsibility of the business director in case that the juristic person is the employer and the juristic person hires the employee to do the act instead of them. Normally, the employer has not to take responsibility in the damages expect it conforms to the case in Section 428.

Due to the fact that the word order is regarded as the violation, the order as the violation and when the juristic person accepts the fault, then the director of the business who is one of the juristic person does not take responsibility personally. The fault can be reviewed from the Supreme Court Judgment, No. 608/2521 that the defendant possessed the Si Praya harbor when people hurried to get in the boat, the wooden bridge landing to boat turning down. This is regarded as the negligence of the defendant who did not take care of the bridge to be stable and strong by allowing it to be broken. The defendant must be accused from the impact which causes people were drown to their death. If the defendant just prohibits them not to hurry, the accident would not happen.

Also, regarding to the Supreme Court Judgment, No. 984/2531, it said that the defendant who is the juristic person hired nor for piling because of the less cost from digging, even though the defendant was aware of the impact from this method toward the soil. This is the cause of the damages of the buildings of the plaintiff and the others in the surrounding area but the defendant did not pay interest. This regards that the defendant who is the employer is accused from the word order which caused damages to the plaintiff.

It can be seen for the activities, though these people are the business owner or the operator working as the juristic person, the director of the business must take responsibility in many aspects. Therefore, they must be aware of their operations or pay attention in their own duties to prevent the criminal liability or the fault in case of the violation because they will be imprisoned or fine for the criminal case which may

delay or stop their businesses. In terms of the violation, they must be bound to make compensation which may cause the higher cost to their businesses and the compensations to the others may result in mal reputation.

In addition, if we consider the criminal liability of the juristic person from the laws based on the criminal liability of the Penal Code, Section 59, paragraph 1, it states, “A person shall be criminally liable only when such person commits an act intentionally, except in case of the law provides that such person must be liable when such person commits an act by negligence, or except in case of the law clearly provides that such person must be liable even though such person commits an act unintentionally. It was found only the regulation has specified to the natural person.

Additionally, the Penal Code of Thailand has not focus on the juristic person case. In respect of the general criminal liability issues, the person who will accused when that person “is conscious in morality” or discernment, the German theory about the mal action of a person, Prof. Dr. Khanit Na Nakhon said that the evilness is the main element of the criminal liability and as aforementioned, the person who can be blame or who is bad must be only the natural person. Owing to, the fact that the evilness is about “to be conscious in immorality” while the juristic person has no consciousness in the “evilness”. For the reason, it is a legal person so this person will never have evilness. With this reason, the Supreme Court is not able to punish the juristic person without the definition from the Penal Code. The major discussions about the criminal liability of the juristic person are as follows:

The discussion about the criminal liability of the juristic person- The discussion can be divided into 2 arguments which are:

The argument about the status of the juristic person – There are 2 ideas according to the 2 theories about the status of the juristic person. The first idea sees that the juristic person cannot commit the criminal liability when it is an artificial person. According to the fiction theory, the juristic person has not existed so this person has not action and intention. This is because the main elements of the criminal liability consist of intention but the liability in the Penal Code particularly indicates to the natural

person. In contrast, the another side theory sees that the juristic person is able to commit the criminal liability because it exists. According to the realistic theory, the juristic person is a person who has the right and duty as regulated by laws as same as the natural person and it can have intention by revealing through the representative according to the Civil and Commercial Code, Section 70.

The argument about the objectives of punishment- There are 2 ideas. The first side sees that the juristic person cannot be accused in criminal case with the reason that the objectives or the philosophy of punishment for revenge, threatening or teaching for the improvement, all of these have been regulated for the natural person and cannot apply with the juristic person. Due to, the principle of the punishment specifying to the offended person, it does not conform to the objectives of criminal punishment. The example is to fine may affect to the partners or the shareholders who are not aware of the wrongdoing. In contrast, the other side sees that the objectives of punishments are able to apply with the juristic person without conflict of its principle because every punishment must affect to the others. Moreover, to punish the juristic person in criminal case will lead to the carefulness in operating business and in stricter personnel control which is advantage to prevent the illegal act.

The argument about the criminal liability of the representatives – Although, it is acceptable that the juristic person can perform any wrongful act, there are only two reasons that the juristic person will receive the punishment. Even though, there are other measurements from some laws such as to cease or the to close the business of temporarily period, these measurements are not capable to solve the problems, due to the reality, there are the natural persons gain direct benefit so it should be concerned on the person who perform the action of the juristic person. This means the director of the juristic person will be punished depending on the severity of the fault. Nevertheless, the criminal liability of the representative can be divided into 3 cases which are the enactment to accuse the representatives from the assumption but they can be free from the accusation if they can prove that they have no relation or did not consent to the act. The enactment which allows the representatives prove selves that the director involved in the act and the enactment of the absolute accusation of the director. The reason to punish the representative because the court regards that the representative

remains in 2 position which are being the juristic person and being self. The court depends on principals and supports of the Penal Code, Section 83 to connect the offence. The problem which should be considered is, does the supporter can be the juristic person or not? Because the supporter must cooperate in the action and co-intention, but the condition of the juristic person is just artificial person. According to the laws, if looking at the action and intention, it may have some argument about the collaborative act and intention, does it exist as a person or not?

The argument about the criminal punishment of the juristic person – In this argument, there are 2 sides, the first one regards that the juristic person cannot commit the criminal liability because the punishment is composed of death, imprisonment, confinement, fine and forfeiture of property which are set up for the natural person and some forms cannot be applied with the juristic person, such as death. For the imprisonment and the confinement. The opposite side agrees that if the laws enforces in civil form, the criminal punishment cannot be applied with the natural person and the juristic person, the stability of the laws will be in harmful situation so the juristic person must be punished. Although some punishment can be in effect, such as fine and forfeiture of property which is able to be applied with the juristic person, but for the imprisonment, it can be compared to the disestablishment of the juristic person. For some cases, the court may prefer safety way, for instance, to prohibit the operation or to close the operation.

In consequence, the legal analysis which can be adapted in the consideration of the criminal liability of the juristic person in Thailand can be reviewed from the situation of the criminal liability of the juristic person. In this present day, Thai Supreme Court is able to punish the juristic person from the intentional case and negligence case as follows:

Willful guilty Act – Nowadays, Thai Supreme Court has set up the judgment of the juristic person in its willful criminal liability on the Judgment, No. 787/2506 (The general Meeting).

Guilty act by negligence - Nowadays, Thai Supreme Court has set up the judgment of the juristic person in its criminal liability by negligence on the Judgment, No. 3446/2537.

However, if considering the meaning of the juristic method which explained that, "...the idea and the attitude of the jurist toward their law systems, the attitude toward the written laws, toward the traditional laws, toward the judgment and toward the general laws and the justice of laws, including the legal method, the interpretation, the classification of laws, the use of laws according to the enactment or the use of laws in analogy, all of these are included in the juristic method..."

The solution of the same problem in the different law system is also followed by the different method, especially the role of the court in the adaptation and the worthiness of the judgment. 1) The role of the court in the law adaptation – The court in the country where applies the code of laws from the enactment by considering general principles then focus on the specific case if the existing laws can be applied with the present case. For example, when the defendant committed a wrongful act, does he must be accused of the criminal liability as enacted or not? Therefore, the important characteristic to adapt the laws in the Civil Law is, "the jurist in the Civil Law is the person who is primarily loyal to the laws..." At the same time, the court in the Common Law regards the judgment of the previous case to be their guide or model of the present case; consequently, in the Common Law System, the court may consider from specific topics and the general principles which will turn to the later precedent. 2) The worthiness of the judgment – The court judgment in the country where holds on the code of laws is just the sample of the adaptation of laws because of having the laws in letter while the court judgment in the Common Law is regarded importantly and accepted as the general laws, called Judge-made law.

As a result, the attitude of the jurist, including the legal solution in each law system is different. In other words, when there is any new case in the Common Law. The court will be freely to set up the principle and the judgment will become part of the Common Law. With this reason, the Common Law becomes the general disciplines for the court. In the code of law system, the court will significantly depend

on the law that the parliament has stated and regard it as the highest laws. The consideration or the judgment of the court will be adapted from the written laws and including the interpretation. Moreover, generally, if it is necessary, the laws will be amended to solve the new issue.

However, the application of studied laws in the judgment of the criminal liability of the juristic person in Thailand can be considered from the same issued in the Common Law. In case of England, this country has used the Common Law to diagnose the criminal liability of the juristic person because the juristic method of the Common Law depends on the principle that whenever there is not statutory law, the court will prefer the Common Law reasoning according to the principle called “The Doctrine of Precedent one.” The problem in considering this issue in England has been developed as follows:

The first one is the argument about the guilty of the juristic person. Formerly, this problem in England was viewed that the juristic person cannot be accused from the criminal case as C.J. Holt said, “the juristic person cannot be sued for the criminal case but the responsible person is the members of the juristic person”. This is the traditional idea of the English jurists that the juristic person cannot be accused in the criminal case. This thinking was spreading in the Common Law countries and the opinion of C.J. Holt was supported from the other jurists such as Blackstone who said, “a corporation cannot commit treason, or felony, or other crime. In its corporate capacity; though its member may in their distinct individual capacities.” Besides, Pollock also thought the same while Holt’s idea was accepted among the judges. The example is R.v. Hugging case, C.J. Raymond set up the principal as the juristic person who had not to be accused in the criminal case from the act of the deputy. Similarly, in the civil case, the person who must be punished must take responsibility from one’s own act.

However, when the city grows, many businesses have developed to be the form of the juristic person. Therefore, the jurists see that if the juristic person cannot receive the criminal liability, it will greatly impact to the city and the people. They began to think the juristic person must take responsibility in some issues. This topic

became gradually improving. There are some judgments declaring the juristic person to receive the criminal liability, except in some offence that they cannot take responsibility. In addition, the legislation has taken some part to assist the development of this issue, including the argument on Procedural Law and the argument on Substantive Law. Later, when the juristic person needs to accept the criminal liability, the English jurists found the solution by the juristic method in the Common Law which will be describe as follows:

1) The argument on Procedural Law – In the past, the people viewed that the juristic person could not accept the criminal liability in respect of these reason form Procedural Law as follows:

1.1 During the procedure of the Assize court or the Sessions court, the 2 litigants must present to the court. Therefore, in case that the juristic person is the defendant, it was impossible to become a criminal case because the juristic person cannot present in the court. The example is the R.v. Harrison &Co. case and the Pharmaceutical Society v. The London and Provincial Supply Association Limited, the local court judged that the juristic person could not present to the court; therefore, the court could not punish the juristic person. Nonetheless, the court regarded that the juristic person should not have to be protected from the criminal case, it needed to punish the juristic person in some criminal level. The England Court tried to solve this problem by issuing the act to set up the judge in case that the defendant is the juristic person. The defendant must appoint the lawyer to defend himself and to present as the representative of the juristic person in the Assize court and the Sessions court.

1.2 The second reason why the Procedural Law regards that the juristic person cannot be guilty from criminal case is the non-existence of the juristic person for the investigation process. Later, English launched the Criminal Justice Act 1925, the Section 3(33) states in case which the juristic person is accused to commit unlawful act, the court is allowing to investigate its representative and the representative will appear to the court, so the problem of the juristic person is solved.

1.3 The final reason why the Procedural Law regards that the juristic person cannot be guilty from the criminal case because the problem to punish the juristic person. Hence, due to the juristic person has no existence so it cannot be punished toward its body. However, the fine method can be applied with this case and this method is respected until today.

2) The argument on Substantive Law – In the past, as they viewed that the juristic person might not be punished from the criminal case with the reason from the Substantive Law especially about the state of the non-existence of the juristic person who is the artificial person. The juristic person can be constituted from its employees and agents. The juristic person at least can take responsibility from Vicarious liability in accordance with the Common Law. Previously, there is not criminal liability of the juristic person but the laws have been amended that it can be accused of criminal act for the offence without Mens rea and the compensation for the others.

The argument about the criminal liability of the juristic person in the view of the Substantive Law, it not only contradicts that the juristic person has no individuality, no act and no intention, it also argues that the criminal act is not included in the scope of its objectives. Thus, due to the Ultra vires, Pollock mentioned that the company cannot commit any unlawful act because it is not controlled by Intra virea. The main problem of Ultra vires, firstly becomes widely discuss but the idea today refuses this principle already. The reason is the juristic person may be guilty from the violation which is regarded as the over scope of its objectives as well. The possible criminal liability according to Ultra vires is not been included to consider this problem at all.

In respect of the types of criminal liability, we can say that the source of law in the country which applies the Common Law System consists of 2 main types which are Common Law and Statutory. The Common Law country will use the 2 types of law together. The distinguish example is the Penal law. In the Common Law System, the criminal liability is composed of 2 types of offence which are Common Law Offence, the offence from the Judge-made law. This law does not come from the legislative but it comes from the previous judgment which has not obligatory as the

law, but the court regards that the judgment is acceptable to follow. Nevertheless, nowadays the English Court has abandoned this practice since the cause of *Knulier v. D.P.P.* [1973]. For Statutory Offence, the offence does not come from Judge-made law, for instance, the English Court set up the principles of the offence which impact the public morality as in the case of *Shaw v. D.P.P.* [1962]. The 2 types of offences are related, for example, for some criminal punishments, the punishment regulations will be specified by the legislative but the regulations which identify the punishment bases on the Common Law, which means this allows the court to consider the offence and the punishment and it may identify cling on one part of the punishment while the offence will be specified by the Common Law.

On the other hand, if regarding the another aspect, the court is the law user, no matter what its objective is, the court is the controller of the state. For this case, the court will use interpretation when the parliament states the unclear law. It will interpret the issuance of law by the parliament does not affect to the existing Common Law and the law does not abolish the Traditional Common Law.

Thus, in particular the issuance of laws by the parliament, the Penal law include 3 types which are: firstly, the new laws from the legislative, e.g. the new regulations of the offence which will not affect to the existing Common Law. Therefore, when the court enforces any act, the judgment will be interpreted from that act and the judgment will connect to the other following cases. This process does not relate to the Common Law because the laws originate from the interpretation of the act launched by the parliament. The second is the legislative regards that the judgment is too difficult to study and too complicated. The state must gather the laws by summary of the judgment and enforcing in the form of the act. This process includes the Common Law to gather in the re-written laws. With this case, the court will interpret the act does not purpose to remove the existing Common Law; therefore, the court makes a reference to the previous judgment. The last is to amend the inaccurate traditional laws which are unfair and out of date. For this case, the parliament will make the bill strictly and closing the chance to interpret, or the court will use the interpretation method as in the second because the traditional laws were set up by the court.

The author agrees with the rules of such consideration. In case that is considered as it is the action violating the regulations, rules, or orders of the juristic person. There is the action on duty, initially, which is consisted of the key criteria as well as the Supreme Court Decision has considered;

- (1) The action which violates the regulations, rules or orders of the juristic person must be the action on normal duty, duty assigned or duties that continuing from normal duty, and
- (2) Even, it will be the action violating the regulations, rules or orders of the juristic person, but it is the action for the benefit of the juristic person.

If it is not the action on duty or it is not the action for the benefit of the juristic person, such action shall not be the action from the beginning because when considering the principle of consideration for the benefit of the person who shall be protected among the juristic person, a representative or an authorized person on behalf of the juristic person and the external person. The author recommends that if a representative or an authorized person on behalf violate the regulations, rules and orders of the juristic person, the need to protect a representative or an authorized person on behalf. Therefore, in this case will decrease when compared to the protection of the juristic person and the external person.

However, if it well considers that it should protect anyone over the juristic person and the external person. The author recommends that in principle the regulations, rules or orders of the juristic person is subjected to force within the juristic person, a representative or an authorized person on behalf of the juristic person. The external person shall not perceive or expect that a representative or an authorized person on behalf of, violate the regulations, rules or orders of the juristic person. In consideration, it shall protect the external person, significantly by the juristic person must take the risk of liability from the action of its representative or authorized person

on behalf of because the representative or authorized person on behalf of works for the juristic person.

Even though, it will violate the regulations, rules or orders of the juristic person, but such violation is for the benefit of the juristic person. Especially, in case of the fact that the occurring damage is directly damaged by the action of violating the regulations, rules or orders of the juristic person. This shall be considered that the juristic person is found guilty as well because the juristic person is issuing any regulations, rules or orders of the juristic person, and it must well know that such the regulations, rules or any orders will cause over the external person. The author recommends that the juristic person shall have the duty to control or prevent the violation of such strict regulation.

Concerning the juristic person get the violation of regulations, rules or orders without prevention or control the action on duty of the representative or authorized person on behalf of, it will have to be responsible for the occurring damage. It is unable to let the occurring risks of damage falling to the external person. This is consistent with the characteristics of liability under Section 76, which is based on the concept on the liability for the action of juristic person itself, it is not the liability for the other person.

A case study: A manager, a financial staff and a clerk of Bangkok bank appointed or assigned to be the committee for counting and keeping the daily cashes. If all three employees violate the rules or orders of the bank as defined. It is not locked the three safe keys, the door is not secured of shutting, the keys are not kept with their own all the time. The violation of such rules and regulations are considered as the carelessness causing the cash is stolen by the thieves in the safe. At the same time, it appears that the bank's customers come to withdraw a lot number of money at such bank branch, this leads cause to get enough money according to the number of money as the customers withdrawing and the financial staff asks for delaying the timing. This causes the damage to customers. Such case, the bank will have to be liable because it is

a case that the authorized person to act on duty as assigned for the benefit of the bank and the juristic person, but violating the internal order causing the customers to get damage because of misconducting the deposit agreement.

The Supreme Court, Decision No. 2291/2534<sup>619</sup> described that the first defendant is a bank accountant had the duty to check up the documents of the applicant who opened the account according to the defendant's regulation. From the evidence, the defendant has brought for investigation, it did not appear that the first defendant checked up the original identification card of such applicant for opening the current account. If the first defendant who had the responsibility and the duty to check up the original documents according to the defendant. It must well know that the applicant who opens the current account by using the plaintiff's name was the owner of such account was not the plaintiff, or even if Thor examined only a copy of identification card which appeared the picture of the I.D. card's owner, completely. It must well know that the applicant who opened such account was not the plaintiff as well. It would be seen that the occurring damage was directly caused by the bank accountant in term of violating the bank's regulations.

The author recommended in this case the bank accountant was an authorized person on behalf of the juristic person, not the employee because it acts on duty which was the key part of bank operation, and the occurring damage over the external person was the direct damage due to the action violating such bank's regulations. This was considered that the juristic person will have to be a part of guilty which might not prevent or control, not to let the authorized person on behalf of, violated the regulations which the juristic person has specified. The juristic person must accept the risk of occurring damage. In this case, it must be considered that the action on duty of the bank accountant as an authorized person on behalf of the juristic person

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<sup>619</sup> See Footnote No. 610

was the action on duty. Even though, it violated the bank's regulations, the juristic person must be liable under Section 76 and Section 420<sup>620</sup>.

In summary, if the representative or authorized person to act on behalf of working on duty by violation of regulations, rules or orders of the juristic person, if it is the action on normal duty, the duty as assigned or the continuing duty from the regular staff, and acts for the benefit of the juristic person. It is considered that the action on duty of a representative or an authorized person on behalf of the juristic person under Section 76.

#### 4.3.2.2 The United States of America

In the United States of America can be considered the 3 criteria that related to the regulations and punishments of the Corporate Criminal Liability. Firstly, it appears the facts that causes to act on the other duties; Secondly, a representative or an authorized person on behalf to act instead by having motive for the benefit of the juristic person, and lastly, to work in other duties occurring during a continuing period with the cause under clause without waiting the time. Otherwise, it may cause the damage to the juristic person. In order to be applied in consideration of whether the other duty is the continuing duty to let the normal duty of a representative or an authorized person on behalf of be succeeded or not, and if it is the case that a representative or an authorized person to act on behalf of the other duties which is continuing from the action on its normal duty to be succeeded and from this continuing action resulting to the action to get the damage without showing any facts appeared that a representative or an authorized person to act on behalf of has performed.

While, it turns to its personal business, intentionally violates the law, causes the damage and acts by violating the rules, disciplines and orders of the juristic person or acts on duty with having personal motive or exploits for its own as personal

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<sup>620</sup> Thailand Civil and Commercial Code  
Section 76 *See* Footnote No. 71  
Section 420, *See* Footnote No. 343

benefit, it is considered as “the action on duty of a representative or an authorized person on behalf of”.

However, it can clearly state that it is noted that the juristic person’s representative or the authorized person may perform in a scope of his or her duty but acts as deliberate infringement or violation by law, especially by the criminal offence. According to Tort Law Section 422<sup>621</sup>, it provides that the damage caused by any offences of protection the other persons from something. It is considered as an offensive person of the representative or the authorized person. Sample was an employed driver for the public security foundation drove through the red light by intent of action causing damage to other driver’s car. Even, the directors of the hotel hire an engineer to construct the hotel without following the construction control regulation till the collapse of the building by caused the death and casualty of workers as many as an offence of the infringement. For example, the directors of the sale company for the counterfeited cell phone brands which were exploded to cause casualty. In the latter case. It is a criminal offence of default or fraud ground against the buyers and an offence of the infringement against the customers at the same time. It is disputed matter if all mentioned actions are “performance on duty” of the juristic person’s representative or the authorized person.

The jurists explained the principle ideas of an offence, if it is caused by duty which is considered as intent of a criminal offence, negligence, dishonesty or malpractice of duty by law, all performance are not the employee’s liability alone but the employer’s liability of an offence of the infringement. In the United States of America, the case is always considered as duty in a scope of objectives or authorities. Hence, the juristic person cannot discuss on his or her own objectives without performance of offences. However, when the juristic person’s representative or the

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<sup>621</sup> Thailand Civil and Commercial Code, Section 422 If damage results from an infringement of a statutory provision intended for the protection of others, the person who so infringes is presumed to be in fault.

authorized person acts deliberately to achieve a scope of objectives or authority, the juristic person always takes part of that action which may cause damage.

Besides, the characteristics of how the action according to the duty of a representative or an authorized person on behalf of juristic person is, the law does not explicitly legislate that how the action according to the duty characterises. To find the meaning of the action according to the duty will have to search from the judgment of the court which the court always rules by using the principle of liability of the employer in violating to the employee under the criminal law. By this way, the judgment of the court is based on legal opinion that how the action according to the duty of a representative or an authorized person on behalf of juristic person is the same as the action of employment. Also, many academics agree in correspondent with to bring the principle of consideration of employment to compare the ruling.

#### 4.3.2.3 The United Kingdom

The liability of an offence of the infringement is considered by 2 elements; namely the primary liability and the vicarious liability when the company is liable for any performance acted by the juristic person agent as if it is the ordinary person who is an employee. The criteria which is used for the consideration of the juristic person's liability and concerning with either the primary liability or the vicarious liability is based on 2 elements of the followings:

Firstly; Whose performance is it? Is it the performance of any persons as of the juristic person's? If it is proven that the performance is acted by the juristic person, it is the juristic person's liability in term of the Primary liability (as stated in criteria two). While, the performance or the intention of persons as organs executed by directors and the managers in the established of the juristic person is not accounted for but rather performance achieved by employees, officials or the juristic person agent who is authorized by the superior. The juristic person's liability is considered in term of the vicarious liability.

Secondly; The performance is confined to authorization or within objectives set by the juristic person as well as in the scope of the officials' authority, of which is under the authorized person on behalf of the juristic person (as stated in criteria one). The unauthorized person is always not considered as the achieving performance of the company including as the vicarious liability covering the infringement of a course of his employment performed by the employees.

In terms of the criminal liability of the juristic person, when reviewing in the Common Law System, the criminal liability of the juristic person in England can be separated as follows: the statutory offence of the criminal liability of the juristic person in England has been improved and amended respectively, divided into 2 periods as follows:

Before the Interpretation Act, 1899, when the English jurists became to an agreement that the juristic person must be liable in the criminal case without limitations or privilege due to its legal status. For the statutory offence, though there were no laws indicate that it must be liable, the court began to give penalty to the juristic person for the criminal case according to the characteristic of the offence as follows:

(1) Nonfeasance which comprises of an omission to act, in case that the laws have identified duty but the juristic person omits to the act, it must be liable to the act. The English Court inflicted the punishment from the nonfeasance in the R. v. The Birmingham and Gloucester Rlwy. Co. (1840) case which is the first time that the court gives penalty to the juristic person due to its nonfeasance as regulated by the law. It is about a company who obtain the concession to maintain the road but the company omits its responsibility. The court judged that the company is guilty as regulated by the laws.

(2) Misfeasance, after the nonfeasance case above, the attitude was developed by adding misfeasance as the commit of unlawful act by the juristic person. It is regarded as the vicarious liability in the Common Law, for instance, the English Court accused the juristic person to be guilty from misfeasance as in R. V. The Great North of England Rlwy. Co.(1846) case. The court judges that the juristic person is guilty from public nuisance act on the highway road. It can be observable that the special guilty is the Strict liability which the accused needs not to have Mens rea but still be guilty.

Therefore, the English Court has no conflict to give penalty for the criminal case.

However, the remaining problem is in case with Mens rea. Does the juristic person have to be guilty or not? After the Interpretation Act, 1889, when the English Court had punished the juristic person in the second case as aforementioned, the legislative saw the necessity to find the solution of the other criminal liabilities by enacting an act called the Interpretation Act, 1889 which states about the interpretation of acts which provide criminal liabilities and launched before and after this act. The act created the word “person” which includes the body corporate, except the spirit of law that demonstrates the others.

In consequence, the juristic person may have to be guilty from the statutory offences according to the Interpretation Act, 1889, except the spirit of law that demonstrates the others. The example is *Howke v. Hulton & Co., Ltd.* (1909) 2 K.B. 93 case, the English Court refused to punish the company, as the juristic person from a rouse and vagabond with the reason that it was not appropriate to the company. Besides, according to the other acts, such as the Solicitors Act, 1932, Section 46, the offence as being a solicitor without qualification as in *Law Society v. United Service Bureau, Ltd.* (1934) 1 K.B. 334 case, the court refused to punish the juristic person from the said offence. However, later the laws were amended. At the present, the Solicitors Act, 1957, Section 22 includes the juristic person.

The juristic person is not only guilty from nonfeasance and misfeasance. It may be guilty from statutory crime but the vicarious liability as the legal person and employer for the employee’s act will be as follows:

(1) Case of *Moussell Brothers v. London and North Western Rlwy Co., Ltd.* (1917) The court punished the juristic person that the natural person may be guilty from the other’s act in the criminal case such as employee, hiring, ordering which may cause the juristic person to be accused. The fact of this case is the employee of the defendant’s company lied to inform the goods loading in order to avoid fee. It was regarded that the defendant’s company must be guilty. Lord Atkin has diagnosed, “...this is to demonstrate that the case was set up for the defendant to be guilty from

the employee's act without claiming the Mens rea of the employer. So, the juristic person as the employer must be accused as well.”

(2) Case of Trlpex Safety Glass Co., Ltd. v. Lancegaye Safety Glass Ltd. (1939). The court punished the juristic person from criminal liability by negligence because the natural person must be guilty from his or her employment. Therefore, the juristic person as the employer must be guilty from the same accusation of the employee. However, the Common Law Offence contradicts to the criminal liability of the juristic person in terms of the statutory laws because of the juristic person has non-existence to be guilty. Until the acceptance of the juristic person to be guilty in the legislative issued the Interpretation Act, 1889. This act is only specific to the case of the statutory crime, excluding the common law crime.

For the common law crime, there was the argument about the state of being the juristic person previously, due to its non-existence and life unlike the natural person. Therefore, it has no criminal intention act and cannot be blamed, especially in the common law crime. Although the judgment to punish the juristic person in offences, there is no any judgment set up the principle that the juristic person must be guilty in the Common Law to believe in the act of a person as equal as the act of the juristic person.

In addition, even though the English Court gave the penalty to the juristic person in several cases, the cases are about the statutory law or vicarious liability. For the Common Law Liability, the question is must the juristic person be guilty from the primary liability or personal liability? Due to the problem about its status, the state of being the juristic person separates from the natural person who are members of the juristic person and for the offence which requires Mens rea causes the conflict to declare it as being guilty when it has no Mens rea. Additionally, Mens rea consists of intention, recklessness and negligence. The negligence in England can be divided into 2 types which are negligence and gross negligence.

Moreover, the criminal liability of the juristic person in England in the Common Law System can be study separately on 2 topics: the common law crime with

intention and the common law crime with negligence. Hence, to punish the juristic person, it must be considered the court will hold on the act of the intention. In terms of Mens rea, it becomes the inner composition of the criminal liability or evil soul. The judge will make a decision without the laws and judge if it is wrong or not. What we will consider when the act is wrong and the mind is also immoral including evil soul, the structure of the common law crime in the Mens rea part connect to the investigation process to find if the defendant contains intention or evil soul.

For the evolution of this issue from the beginning on the Organic Theory or Identification Doctrine was generalized about corporate entity. The principle about the litigation accusing the juristic person to be guilty from civil liability by the natural person whose name is under the title of the juristic person. Due to the consequence from the industrial revolution and the development of transportation. The juristic person gain more roles in the society, especially in the investment and activities in train transport business which results in the damage to people and property. The idea about the civil responsibility of the juristic person originated by Viscount Haldane L.C. who started to generalize the 2 civil cases about the problem: whose act and intention is the act and intention of the juristic person. The two cases are, firstly, *Lennards Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (1915), Haldane said, "...the juristic person is just an abstract, no life, no soul, impersonal and no act while its management requires the natural person to perform the action in order to achieve its objectives or as called agent who represents its intention and objectives... to regard the act and the intention of that person as the act and the intention of the juristic person, which the person may be under the control of the general meeting of shareholders or the board of directors or the authorize persons from the board. Due to, the fact that his or her act is the act of the company..."

Therefore, the act and the intention of the juristic person's organ will be assumed as the act and the intention of the juristic person. The Haldane's principle is called Organic Theory. In the case *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., (Great Britain) Ltd.* (1916) which held on the Organic Theory of Haldane, Lord Parker judged, "...the act of the company's organ such as directors or managers within

the limit of power will be counted as the act of the company...”

Besides, for the intention of Mens rea liability, according to the Organic Theory or Identification Doctrine as aforementioned, the 2 cases are just guideline for the civil liability of the juristic person. However, when the problem occurs, the English Court will bring the Organic Theory of the civil judgment in the criminal crime, by viewing that the act and the intention of the juristic person’s organ be the criminal act and the intention of the juristic person as well.

Regarding to the 3 cases in 1944 which held on the Organic Theory, the judgment of D.P.P. v. Kent and Suyssex Contractors Ltd. (1944) reveals that the company was guilty from deception and false accounting by the act of the company’s officer. Macnaghen considered, “...the juristic person is able to realize and to intend via the natural person and in some environment, the realization and the intention of its agent can belong to the juristic person...” In R. v. I.C.R. Haulage Ltd. (1994) case, the director and the others were accused from fraud which is the offence that requires the state of mind. The lawyer of the company defended that the juristic person could not perform this unlawful act which requires the intention but the Court of Criminal Appeal sentenced the juristic person from fraud, though the offence requires mal intention and the juristic person has no soul, the court could count the act of the director as the act of the company. J. Stable pondered, “...the court could not make a decision for the juristic person who has to be guilty from its own agent in every reasons because any appointment from the company must be punished in criminal method depending on the type of offence, behavioral environment and related facts...” After, the court made the final decision, the Organic Theory or Identification Doctrine was later called “Alter Ego Doctrine” which means the state of mind of the organ to be regarded as the company’s own.

This results in the denial of the previous thinking which states that the juristic person cannot be guilty from criminal liability which requires Mens rea because it may have Mens rea by the act and the state of mind of its organization. The example is the Moore v. I. Brester Ltd. (1944) case, the court accuses the juristic person from the criminal liability according to the Finance (No.2) Act, 1940, when the branch

manager had informed fault tax information. From the big 3 cases in 1944, the principle of Alter Ego Doctrine is not about the vicarious liability anymore but it is the criminal liability of the juristic person. We can understand more clearly from the case of Tesco Supermarket Ltd. v. Naltrass (1972) which demonstrates the most illustrated picture of the criminal liability of the juristic person according to Alter Ego Doctrine or Identification Doctrine that is different from the vicarious liability. Lord Reid judged, "...in case that the mind of the natural person can reveal the intention while the act by negligence can be displayed by itself but due to the fact that the juristic person has none, the act must be performed via the natural person.

Therefore, the person is not speaking or acting for the company. He is acting as the company and his mind which direct in his acts is the mind of the company. When he has performed any act under the name of the company, this is not the vicarious liability. Besides, this person is the individuality of the company. It can be said that the juristic person can hear and speak via its officer but the act must be limited appropriately. This means the mind of its agent is the mind of the company so if he has guilt mind, that mind belongs to the company as well. The problem that we must investigate to be certain which position that he committed act in the name of the company or the user or the agent, owing to the fact for the final case, being the agent, it will be counted as the vicarious liability..."

To conclude, the solution of the criminal liability of the juristic person for the common law crime of England according to Alter Ego Doctrine. The English Court regards the company of the juristic person and the controlling officer as the same person. The act of the controlling officer will be counted as the act of the company. So, the juristic person must be guilty from the criminal liability even the offence requiring Mens rea. Similarly, in England, there is the consideration of the offence which requires negligence of Mens rea because apart from the mentioned offence, the English Court improved the principles of fining in criminal case of the juristic person as well as intention case. The court also developed the criminal liability of the juristic person from gross negligence. We can see the example from "Herald of Free Enterprise Disaster" case which the court judged that the juristic person might be guilty from negligence

which causes the other's death or called Corporate Manslaughter.

Although, the court dismissed the case, the common principle that the court has set up and opens the chance for the juristic person to take the offence. It was found that the juristic person will be offended from the criminal crime when there are "act" and "intention" of the controlling officer or the controlling mind. This means that person must remain in the high position to "think" and to "do" instead of the juristic person.

In contrast, the juristic person does not constitute from only one person to control the mind in the reality but members are distributed their responsibilities in specific unit, especially in health and safety. Harris (2014) explained that, In the past, the English Court did not punished the juristic person from negligence which cause the other's death because of *R. v. Cory Bros. & Co. (1927)* case, the judge Finlay reviewed that it could not be punished from manslaughter accusation due to the order of the company. The company had ordered to replace the leak electrical cable but a drunk man walked pass and stumbled which caused his death. For this case, the court could not punish the company because the offence contained only the damage to body. Nonetheless, the court judged that the juristic person may be offended from Corporate Manslaughter when 193 passengers of *Herald of Free Enterprise* died on 6 March 1987. The ferry's owner is P&O European Ferries which is the juristic person and its employees were accused from negligence which caused manslaughter.

Later, the court judged the *R. v. P & O European Ferries (Dover) Ltd. (1991)* case by accepting that the criminal liability by negligence of the juristic person which caused Corporate Manslaughter. The juristic person must contain gross negligence of *Mens rea*, although all defendants in that case were acquitted, this is the first case that accepted the criminal liability of the juristic person from negligence which caused manslaughter. The problem is how we evaluate the gross negligence of the juristic person. Then, the principle was specified in *R. v. Prentice (1993)* which identified that the gross negligence must contains these characteristics which are the indifference of an obviously harmful risk toward the health, the actual foresight to see the risk and the continuity of the action, the actual foresight to see the risk even trying

to avoid but still remain neglected.

Moreover, the English Court made the decision and planned the principles of gross negligence in that case. The legislature submitted to make a bill in order to state the criminal liability by negligence of the juristic person which causes Corporate Manslaughter. The regulations state, “a company will commit the new offence of Corporate Manslaughter if its activities were managed or organized by its senior managers so as to cause a person’s death and amounted to a “gross breach” of the duty of care owed to the deceased”. For the punishment in criminal case, the juristic person according to the fiction theory which regards as the fictitious person may not be imprisoned but the penalty would be an unlimited fine.

After, the consideration in action of a person under the name of the juristic person. The English law says that although the law becomes acceptance of the criminal liability of the juristic person, the common law crime and statutory crime but the problem which still exist is that act and intention shall be regard as the juristic person’s. Even though there is Alter Ego Doctrine which appears in *R. v. I.C.R. Haulage* (1944) or *Tesco Supermarket Ltd. v. Naltrass* (1972) which separate the offence of the defendant and the vicarious liability but the problem still remains difficult to make the decision or which the act and the intention of the agent shall be regarded as the juristic person’s.

In this term, Glanville William processed evaluated the principles that in case of the act and the intention of the juristic person. It must conform to these 2 regulations as follows: (1) the act and the intention must originate from the juristic person which separated from the act of its servants or the directive or governing body who is an organ of its organization. Normally, they are directors or managers and for *D.P.P. v. Kent and Sussex Contractors Ltd.* (1944), the controlling officer is directors and managers while the case, *R. v. I.C.R. Haulage* (1944), is the general manager. In case of big companies which own many branches are the branch manager included in the juristic person or not included? In the case of *Moore v. I. Bresler*, the general and sale manager at any branch of the company can be the controller of the juristic person. The criteria in the separation of the user’s or agent’s act will look only at the act of the

governing body as the act of the juristic person. This criterion has been acceptable which can be seen from the judgments, for instance, *H.L Bolton (Engineering) Co., Ltd. v. T.J. Graham & Sons Ltd.* (1957). The judgment of the Denning L.J is, "...some personnel in the company are just servants or agents, so we cannot claim that they are the represent of the company but the representative is the directors and the managers whose mind and intention belongs to the company. Therefore, the state of mind of the managers are the state of mind of the company and they are the governing body as well..." (2) to separate the corporate business from the private business, if the juristic person controls the business and perform any act over the course of employment will not be regarded as the company's act. However, the definition of course of employment is narrower than the same work in the civil method differing from in the criminal method, though the result of the action does not benefit to the legal person, for example, the action with the purpose of fraud toward the juristic person still remain its "course of employment". As same as in the *Moore v. I. Bresler Ltd.* (1944) case, the court sentenced the company to be guilty from informing false tax evaluation having the collaborative intention with the branch manager. Although, the branch manage had done intending to fraud the company because his action is under the position as the company's officer and within his authority; therefore, the juristic person must be responsible for the act.

Considered in term of the limitation of liability for criminal offences of legal entities, it can be explained that, another problem that is related to having legal entities to be responsible for criminal offences. Even though, the legal entities accept liability for criminal offences according to both common law crime and statutory crime, but the condition of the legal entities are not the person that they do not have heart and soul, therefore; the legal entity's natural condition is not the same as the natural person. Thus, there are some offences that the legal entities may not be subjected to liability as follows; (1) Non-finable offences: a fine is the only penalty that can be used with legal entities, and if it is an offence that is subject to other penalties besides fining, the legal entities may not be subject to liability such as offences that its penalty is only body penalty for example; the case of *R. V. Cory Bros. & Co.* (1927) which judge Finlay could not be judged the company for punishment as the Manslaughter Offence because

the company had ordered to install leaking electrical cables in order to protect the company's properties, unfortunately, there was the person stumbled upon the cable and caused the loss of life. So, in this case, the legal entity cannot be punished at all as such offence is subject to body penalty only. (2) Offences by the condition of the legal entities, the legal entities are not able to be responsible for such offences as some formal procedures have to be done first before considering as offenders, such as bigamy or perjury, this is because the legal entities cannot get married or swear for testimony. However, regarding to the penalties for perjury, the legal entities may not be liable but it may be liable for being a supporter (3) Conspiracy offences: the legal entities cannot commit conspiracy offence as there is only one person who violates the law which is the director only.

Likewise, regarding to the liability of legal entities for criminal offences in the case of Corporate Manslaughter according to Corporate Manslaughter and Corporate Homicide Act 2007. After, the English Court had judged, by establishing the principle mentioned that the legal entities may be liable for criminal offence in the case of Corporate Manslaughter in the R. V. P. & O European Ferries (Dover) Ltd. (1991) case. The Ministry of Interior of England needed vividness concerning the principle that the legal entities may be liable for criminal offences of Corporate Manslaughter; therefore the legislation was suggested in order to design the principle for the issue and the reason was given as “we are highly concerned about the security in the work place which means that there should be efficient law to prosecute those organizations who neglect to take care and manage health and safety within the work with fatal consequences.

In addition, the existing law that will prosecute the legal entities for Corporate Manslaughter Offence is still tied up to the definition of “gross negligence” of senior managers who might be considered as the self of the legal entities, which it does not reflect complicated condition of modern legal entities. So, there should be a reform concerning such issue.” After that, the law was declared under the name “Corporate Manslaughter and Corporate Homicide Act 2007” which is the law that assigns the new offence in the Great Britain for prosecuting companies and other

organizations where there has been a gross failing, throughout the organization, in the management of health and safety with fatal consequences. “The Corporate Manslaughter and Corporate Homicide Act 2007” was declared as a law in July 26, 2007 and enforced in April 6, 2008. The essence of Corporate Manslaughter and Corporate Homicide Act 2007 are as follows; the first aspect is the offence’s elements, according to Corporate Manslaughter and Corporate Homicide Act 2007, Section 1(1); organizations that take responsibility for this offence must understand the following elements of offence, 1) management that causes a person’s death, however, the management must be the operation that has been done by “senior management” as mentioned in Section 1(3), 2) there has been a gross breach that there is a deceased which such breach must have been very serious that the organization should have relevant duty of care according to Section 1(4). Furthermore, according to Section 2(6) also nominated that it is not necessary to consider the level of relevant duty of care of the legal entities as per common law rule anymore.

Moreover, considering the aspect of the accusation of the legal entities according to Corporate Manslaughter and Corporate Homicide Act 2007. The accusation of organizations that must be liable under the law must be consented by Director of Public Prosecution or D.P.P as per Section 17. In conclusion, even though the Court of England once used to be judged by establishing the principle of Corporate Manslaughter in *R. v. P & O European Ferries (Dover) Ltd.* (1991) case. The legislative court also wants the vividness concerning the issue in order to protect public health and safety by determining organizations, which the meaning is broader than the legal entities or corporation must be liable for criminal offences as well. The court case samples were mentioned all accounted for the liability of the company. It is argued that if the juristic person’s liability covers with only the juristic person as the established company or with other typical juristic person. When the Company Act is considered accordingly, it states that the company in a guise of the juristic person can act and be obliged under its entitlement by law including be filed in the court when the misplaced authority is found. This was also explained by the British Solicitor who cited the liability of the company which can be put in action since the company is considered as the juristic

person by law. Any juristic person established by law can be liable for the common ground.

For the actor whose performance is the juristic person may result in the Primary liability by law when the actor holds capacity of executing performance of the juristic person in the whole functioning part describing as brain or mind of the juristic person but rather not the authorized person under lines of commands like a board of directors, the managing directors for example. On opposition, if it is found that the performance is acted by employee or the juristic person agent without capability of directing the operational juristic person. It is the Vicarious liability of the juristic person for those subordinates.

It can say that, if the liability for violation caused by the action of the employee. The employee's liability is called as the liability for the action of other persons (Vicarious liability) which refers to the liability of a person in violating to another person by that the person is not liable for the violation itself. It is an offense that the liable person will not act intentionally or carelessness or take part in the liability. It is liable to the damage party does not have to prove the guilty of the person to be liable. Due to, the law is considered that the liable person has been involved in causing the damage and the liable person will have to be obliged in proving the fact that is difficult and may cause the unfairness. The law has assumed that such person is liable without action of the violation of such person.

In addition, the legal principle of liability for the action of another person is more accepted in the British Law. By theory, it explains to the employer will be liable, even if it is not due to its fault according to the theory of liability base on fault because the way which the employer has authority to control over the employee and the employer has to be careful in selecting the employees, and the social reasons that the employer is liable for those involved in the occurring damage.

As the Corporation Criminal Law in the UK which the lawyers have explained that the job which the employee does according to legal relationship between the employee and the employer. The job of employer and the employee is a recipient of such job. Accordingly, if the employee has made the violation, the employer will also have to get such result by being liable for the consequence of violation by the employee has made to the employment. By this way, the liability is the liability along with the employee under Section 291. But, the employer has the right to request exhaustively for compensation from the employee later. When the employer has owned the job and gets the job result. There are many reasons that the employer will have to be liable because the employer is the controller, selects and trusts the employee. If the employee behaves badly, the employer has the right to discharge it. The employee will have to comply with the order with these reasons, if the employee has made the violation, the employer will also have to get its result.

Regarding the liability of the infringement in most court cases, the judicial system has expanded into the liability of the criminal offence. When considered a civil offence of the infringement under the corporation law achieved by any persons. The person may or may not be liable for what degree of the infringement is considered as liability. The author has cited from the application of law in the judicial system, it is obvious that the judge focused mainly on the state of mind of the person as organs as of the juristic person's. If it is found that the juristic person agent has malice by law. It is the juristic person's liability based on the liable of the ordinary person as organs of the juristic person without doubts.

According to the adjudication by the court, it is fundamental in more specific that the Primary liability of the juristic person depends largely on the scope authority or objectives made by the juristic person along within the scope of the officials' authority. When the liability is considered by the performance acted by the authorized person as organs of the juristic person. It is the juristic person's liability in term of the Primary liability rather than the Vicarious liability.

#### 4.3.2.4 France

In France, it refers to the action that the employee has performed for the hiring job success and the existing cause is the result of such work practice, not only the existing cause in a period when the employee is performing the hiring job. Furthermore, it is during the period that the employee is performing, it is still the action that violates the employment. It is important to consider whether such violation is the result of performing in duty or not. If the employee has violated as the result of its performing. The method of employee's performing is the method with intentional violation, carelessness, un-honesty for personal result of the employer or by violating the employer's order, it is not the performing method. But, it is still the violation of performing in duty and it is also considered as the action of employment itself. It is the malpractice method which is the matter between the employer and the employee. This does not let the employer be away from liability for violation of the employee. Also, in performing the assigned duty is not limited of the employment agreement, if the employer orders to perform the other duties in addition to assigned duty and the employee agrees to perform, it is considered to be assigned to do as well.

Regarding the analysis of law principles in order to apply in the penalty for criminal offences of legal entities in Thailand. The consideration can be operated not only from the law principle of England but also from the law principle of France as well because France is the country that enforces civil law system. Besides, France has played an important role regarding the development of Thai law since the period of King Chulalongkorn by Georges PADOUX who was the president of the legal drafting process for The Penal Code of Siam R.S. 127 until it was declared.

Furthermore, currently France has much further developed the principle of law concerning the liability for criminal offences of the legal entities and particularly legislated the general principle of the liability for criminal offences of the legal entities in the Code Penal 1992 as well as directly designed the criminal penalties of the legal entities and vividly appointed liability for criminal offences of the legal entity's representatives. The comparison with France's case should be greatly useful because Thailand is the country that enforces the civil law as well.

In addition, France is the country that is enforcing the Civil Law, so the consideration problem of liability for criminal offences of the legal entities contains juristic method that is different from the method using in England which is the country under Common Law System. It can be seen further that the principle regarding the liability for criminal offences of legal entities in Code Pénal 1992, France has brought the principle that was developed from the Common Law System of England in to the code while the court of Thailand uses the principle of common law system to prosecute cases directly without going through any legislation. The problem of liability for criminal offences of the legal entities in France was a contentious issue for a long time before it has developed as presented today which can be seen from respectively development as follows;

Firstly, the argument about liability for criminal offences of the legal entities; originally the problem of liability for criminal offences was the topic that has been argued and studied widely in France in which some people agreed and some disagreed with the argued issue. Those who disagreed gave a reason concerned the legislation of law that criminal law focuses to control only the behavior of human and if there is no specific legislative law then the legal entities cannot be penalized.

Moreover, by considering actions and intention, it is difficult to point out that the legal entities have actions or intention in term of crime and penalties were only designed to penalize human or natural person such as death penalty and prison sentence. In addition, those who agreed that the legal entities should be liable for criminal offences pointed out that the legal entities are social power in the age of modern life. Therefore, the dangerous condition might be shown by committing criminal offences, especially in the aspect of commercial laws and laws concerned unfair competition which is economic law, etc. Actually, this party thought that the legal entity consists of personnel's intention that combined as the legal entity by participating in an operational meeting, and so on. Thus, the legal entities should possibly have criminal intention as well which can be seen from the principle of Civil Law that allows intention to be expressed by the legal entity's representatives in accordance with France Civil Code Section 1382. Besides, the penalties that will be used with the legal entities might be

something suitable such as the cancellation of the legal entity or forfeiture of property, etc.

Regarding the liability for criminal offences of the legal entities according to the court's consideration method which can explain that, before enforcing the Code Penal 1992 in March 1, 1992, the principle regarding to liability for criminal offences of the legal entities was very clear; the legal entities will be only liable for criminal offences when there is vividly and implicitly legislative law which liability for criminal offences of the legal entities is only considered as special responsibility. Therefore, apart from the case, the court of France does not judge the legal entities for criminal penalty such as the criminal court of Paris dismissed the defendant who is the legal entity, that the company cannot be liable for the criminal offence according to the law of freedom and communication (Loi du 29 juillet 1881 relative à la liberté de la presse) because the law does not legislate that the legal entities shall be liable for criminal offences. Considered the jurisprudence in France, it shows that the court has always set the method that the legal entities shall not be liable for criminal offences even though it is the fine which this results in many legal effects such as the legal entity's representatives whose participated in the offence may not be penalized as the legal entity's representative (à qualité), but the legal entity's representatives shall be only liable for the offence as a personal liability.

However, since the end of the last decade, the French Court started to penalize the legal entities for no intended offences in which the Supreme Court of France (Cour de Cassation) reasoned that such offences were not depend on intention at all. Anyhow, only for the legal entities that have legal quality (qualité juridique) which may be an offender such as "owner" and "employer", and so on.

Nevertheless, there is still an issue, even though the legal entities are penalized as mentioned above but the penalty used with legal entities is not effective to make the legal entities to receive bad results according to the objective. Considering the aspect of the condition of the legal entities according to the principle of French law, originally, before France declared the new criminal code, there was no law that the legislates of the legal entities to be liable for criminal offences in general, except only

for some offences and cases which tended to increase more and more. But, most of these laws are fine liability (*Responsabilité civile des amendes*) which consisted of both civil and criminal characteristics and may fine the legal entity's directors or the self of the legal entity directly such as Section 428 of Criminal Code 1810 that was cancelled in 1994 about penalized the legal entities. In addition, concerning the aspect of solving problem by the legislative court, details are as follows;

French criminal lawyers argued about the legislation of liability for criminal offences of the legal entities in order to solve the problem by applying the juristic methods of Civil Law System in 1934 and successfully declared as a law in 1992 and started enforcing in March 1, 1992. The principle of liability for criminal offences of the legal entities that was vividly established in the Code pénal 1992 is considered as the important innovation of law (*L'innovation majeure du Nouveau Code Pénal*). The crucial reason that the preparer of the Code pénal 1992 has designed the principle of liability for criminal offences of the legal entities was the legal entities shall not have privileges to not be liable for criminal offences anymore especially when considered in term of the objective of penalty (*Considérations répressives*) after that, the legal entity's actions affect public health, environment, society and economy. This is because in the past only the natural personnel that shall be liable for criminal offences. So, considering the aspect of equality (*Considérations d'équité*), the legal entities are liable for criminal offences resulting in equality.

However, according to the (Code pénal 1992), there are 3 main principles concerning liability for criminal offences of the legal entities as follows; there is a general legislation regarding the liability for criminal offences of the legal entities which clearly mentioned in Section 121-2, there are types of offences that must be liable for clearly assigned, and there are penalties assigned especially for legal entities. In addition, considering the liability for criminal offences of the legal entities according the Criminal Code 1992, currently France chose to clearly legislate principles that are related to liability for criminal offences of the legal entities in the Criminal Code 1992 which consideration the principle concerning liability for criminal offences of the legal entities were nominated and the main ideas are as follows;

1) The consideration criterion of liability for criminal offences of legal entities

1.1 Legal entities shall be liable for criminal offences: The Criminal Code 1992, Section 121-2 legislated as a general principle that the legal entities shall be liable for criminal offences except the government (État) which is the legal entity according to the public law. Furthermore, the local government and the cooperation (les collectivités territoriales et leurs groupements) shall be liable only for the offences that caused from activities that were only operated under their duties and authorities. Hence, the legal entities are liable for criminal offences that consists of 12 legal entities according to the Civil Law such as company, association, foundation, and legal entities according to the public law.

1.2 The condition of liability for criminal offences of the legal entities which Section 121-2 defined the condition that the legal entities shall be liable for criminal offences when there are law or regulation which appoint the legal entities to be responsible for such offence if the offence has been done by the organizations or representatives for the purpose of the legal entity's benefits and if the offence is eligible for liability for criminal offences according to Section 121-4 to Section 121-7. For cases that the law clearly defined the liability for criminal offences of the legal entities in the Criminal Code such as drug production of Section 222-35 appurtenant to the Section 222-50, defalcation of Section 313-1 appurtenant to the Section 313-9, embezzlement of Section 321-1 appurtenant to the Section 321-12 and so on. According to, the consideration principle of liability for criminal offences of the legal entities in France. It can be seen that France applied the juristic methods of the Civil Law to solve problems concerning liability for criminal offences of legal entities by clearly determining the criterion of liability for criminal offences of the legal entities.

2) The penalty for criminal offences of the legal entities: according to the Criminal Code 1992 of France in the part that is related to the liability for criminal offences of the legal entities, what is considered as a culture is that, besides the determination of the legal entity's liability for criminal offences, there is also a legislation of penalty especially for the legal entities. This is because the original

criminal penalty was only prejudicial for natural person such as imprisoning penalty. Regarding to the appropriate penalty that will be used to prosecute the legal entities such as fine. After that, applying it with that the legal entities the result is not or not much prejudicial.

Moreover, in comparison with penalty that the natural person will be prosecuted, it might cause inequality problem which is against the principle of equality before the law such as, according to the Social Security Act of 1990 which stated, “shall be penalized for imprisonment of not more than 6 months period or shall be fined of the amount not more than 20,000 Baht or both”, which if the offender was the legal entity, the company will only be fined for 20,000 Baht while the natural person may be both fined and imprisoned which resulting in inequality. For example, as mentioned in the judgment no. 3446/2537 to penalize the first defendant (which is the legal entity – the author) for a fine of 20,000 Baht and for the imprisonment penalty to be suspended for 3 years.

As mentioned in the Criminal Code, Section 56, regarding to the concept of the determination of penalty for especially the legal entities and separately for the natural persons, which were determined by considering sanction or harmful penalty that is appropriate for the state of the legal entities, particularly, it can be seen that such penalty will be harmful for the business or the existence of the legal entities. This type of penalty is actually appropriate better than the penalty that was defined for the natural persons but it applied to use with the legal entities in which it might cause inequality. For example, according to the judgment no. 3446/2537 that the Supreme Court has prosecuted the legal entity for Corporate Manslaughter as mentioned in the Criminal Code, Section 291, which the designed penalty is “...shall be penalized of imprisonment for not more than 10 years and shall be fined for not more than 20,000 Baht”, and the legal entity was penalized for a fine of 20,000 Baht only. However, for the criminal penalty of the legal entities that was especially and designed separately from the natural persons, according to the Criminal Code of France, it was legislated in accordance with types of offence and can be applied with Thai law, including; Highest penalty (crime) and moderate penalty (Délit) for the legal entities, the Criminal Code of France 1992,

Section 131-37 defined the highest penalty and moderate penalty for the legal entities, which is the fine and penalty that was specially defined for the legal entities which details are as follows;

1) Fine: the Section 131-38 mentioned that the highest rate of fine for the natural persons, when apply to use with the legal entities, such fine should be increased to quintuple.

2) Penalty that is specially defined for the legal entities: the penalty that is specially defined for the legal entities in the Criminal Code of France stated that the court can penalize the legal entities who offended by determining the penalty by comparing with the natural persons' penalty, and according to the quality defined in Section 131-39, which details are as follows; dissolution: the court may order to dissolve the legal entity, if that the legal entity offended and the offence is liable for imprisonment of the natural persons more than 5 years and such offence violated the objective of the legal entity establishment, the prohibition from exercising activities: the court may punish the legal entity by prohibiting the company to operate any activities without the period of termination or for the prescribed period of not more than 5 years, placing under judicial supervision: the court may order to supervise the legal entity's business with the prescribed period of not more than 5 years, the closing of business: the court may prosecute the legal entity by closing down the business without the period of termination or with the prescribed period of not more than 5 years for the branch that committed the offence, the exclusion of public auction: the court may prosecute the legal entity to not participate in any auction organized by the government without the period of termination or with the period of not more than 5 years, the prohibition of public funding: without the period of termination or with the prescribed period of not more than 5 years, the court may prohibit the legal entity to not do any funding from the public without the period of termination or with the prescribed period of not more than 5 years, the prohibition of cheque issuing or using credit cards: the court may persecute the legal entity by prohibiting of issuing cheques or using credit cards with the prescribed period of not more than 5 years, except it is a cheque payable to withdrawn cash, confiscation: the court may confiscate the assets that will be used

for the offence or the assets obtained from such offence by the legal entity, displaying or distribution of the judgment: the court may prosecute the legal entity by displaying or distributing the judgment of penalty via publication or media.

However, the penalty mentioned in no. 1 and 3 shall not be applied with the legal entities under the public law which might be liable for criminal and this also includes parties or political groups as well as labor union. In addition, the penalty stated in no.1 shall not be applied with organizational representative of personnel.

Petty offences (Contravention) for the legal entities: The Criminal Code of France 1992, Section 131-40 has set penalty for the legal entities which included fine and special penalty, details are as follows;

(1) Fine: Section 131-41 specified that the highest fine rate for the natural persons when applied with the legal entities, the fine rate shall be increased to quintuple which is the same as the highest penalty (crime) and moderate penalty (offence) for the legal entities according to the Section 131-37.

(2) Penalty defined specially for the legal entities: the penalty that is specially defined for the legal entities that are petty offences (contravention), according to the Criminal Code of France, the highest and moderate penalty was designed for the legal entities according to the Section 131-39 that the court shall be able to prosecute the legal entities by determining penalty comparing with the penalty designed for the natural persons, and as characteristics defined in the Section 131-42 is the additional penalty which contains following details;

1) General case: The Criminal Code of France 1992 Section 131-43, the court may prosecute the legal entities with the additional penalty as mentioned in the Section 131-16 which included confiscation. The court may confiscate the assets that the legal entity will used or used in the offence or the assets obtained from such offence.

2) Petty offence of the fifth class: if the offence that the legal entity has done is petty offences of the fifth class, the French Criminal Code, the final passage of the Section 131-43 stated that the court may use discretion to punish the legal entities

according to the first paragraph of Section 131-37, which included the prohibition of cheque issuing with the prescribed period of not more than 1 year except it is a cheque issuing to withdrawn cash, the prohibition of using credit cards and the confiscation of assets that will be used or used in the offence or assets obtained from the offence. Anyhow, in the case that the court will prosecute using the additional penalty according to the French Criminal Code in the Section 131-45 also provided discretion to the court to prosecute using only the additional penalty.

Considering the aspect of liability for criminal offences of the legal entities of France's law that can be applied to Thai law. It shows that even though the French Criminal Code specifies the legal entities to be liable for criminal offences in case that the law is directly determined, but it does not mean that legal entity's representatives will be free from criminal liability. In addition, Section 121-2 paragraph 2 clearly legislated that the liability for criminal offences of the legal entities shall not free the offending natural persons or supporters. Thus, the French law is still concerning the reality that an offending person is the natural person, either it is offending action or just neglecting to control and take care resulting in offences.

Therefore, the punishment of the natural person who is related to the legal entity will contribute the penalty to meet its objective. However, the legislation of French law can be adapted to enforce in Thailand because considering the legislation of the French Criminal Code. It revealed that the method of law legislation consists of the following important characteristics, including the legislation that concerns the natural person as a main point in order to control human's behavior. So, the legislation regarding to the penalty is concerned of the penalty for the natural persons. For example; in the 3 characteristic regarding the offences against property in the conviction for larceny part, elements of offence will be legislated in Section 311-1 and punishment in Section 311-3 or in the Section 311-4 in case of serious situations. The punishment will concern of the natural persons as the main point because it contains the penalty of imprisonment. Another aspect is legislation of liability for criminal offences of the legal entities that was legislated clearly. This is in accordance with the general principle of many countries using the Civil Law that the legislative court is the

group who legislate laws. Especially, in the case that is related to criminal liability, the principle of no crime nor punishment without law is even more vivid, that only written laws can punish a person to be liable for criminal offences.

Therefore, for the part that is related to the liability for criminal offences of the legal entities, the French Criminal Code will clearly legislate the criminal liability of the legal entities in the case that the legislative court wished it to be such, for example; regarding offences concerned conviction for larceny that elements of offence were legislated in Section 311-1 and punishment was legislated in Section 311-3 or Section 311-4 for serious situations. The punishment was legislated considering the natural persons as the main point as it contains imprisonment, but the legislative court wished the legal entities to be liable for offences. So, there is a clearly legislation in Section 311-16 mentioning that the legal entities shall be liable for offences in this category as well. In addition, there is also the punishment specifically for the legal entities.

Furthermore, France also considered the circumstances after enforcing the law. It was found that the French Legislative Court has defined more liabilities for criminal offences of the legal entities. Moreover, the French Court has appropriately punished the legal entities according to the legislated punishment such as the judgment of the French Supreme Court that punished the hunting association, which is the legal entity for the offence of voluntary homicide. Likewise, the French Criminal Offences of the legal entities for negligent actions concept can be adapted to enforce in Thailand. Considering the French Criminal Code of 1992, Section 121-2 which contains the general principle of liability for criminal offences of the legal entities and clearly defined types of liability. It can be seen that the French Criminal Code of 1992 has defined offences that legal entities shall be liable for in which most of them are intended offences. After enforcing, there has been some revision so that legal entities shall be liable for the offence caused by negligence such as causing the death of other without intention. In addition, the French Criminal Code of Section 221-6 defined the legal entities shall be liable for criminal offences of causing death of other without intention, which were legislated in Section II Involuntary Offences Against Life as follows;

carelessness, imprudence, inattention, and negligence or neglect of duties or carefulness in safety required by law and according to the Section 221-7, the legal entities shall be responsible for those offences or involuntary offences against the physical integrity of the person. The French Criminal Code, section 222-19 defined the legal entities shall be liable for criminal involuntary offences against the physical integrity of the person which were legislated in the “Section II Involuntary Offences against the Physical Integrity of the Person” as follows; causing the inability of doing normal activities for more than 3 months from carelessness, imprudence, inattention, and negligence or neglect of duties or carefulness in safety required by law and the Section 221-21 appointed that the legal entities shall be liable for such offences.

Therefore, it can be said that the consideration of liability for criminal offences of the legal entities in France is in accordance with juristic methods of the Civil Law System, to be clearer, before the determination of criterion of liability for criminal offences of the legal entities in the French Criminal Code of 1992. The French Supreme Court will judge only cases to punish the legal entities directly or implicitly as defined by special law only. This is in accordance with the concept of law for many countries that are enforcing Civil Law, which is considered as a general principle that the legal entities will not be liable for criminal offences because they do not know what is right or wrong as can be seen from the case occurred in the Supreme Court of Belgium that “apart from the case which the law was legislated, all of the legal entities may not be punished for criminal offences because in reality, the people who claimed that they did such offences on behalf of the legal entity and they shall be punished.” Many countries that clearly accept the issue of liability for criminal offences of the legal entities under the Common Law System and there are 2 countries under the Civil Law system, including Netherland and France.

However, many countries under the Civil Law System tend to accept this concept more especially Germany and those countries that are influenced by the German law such as Spain, Portugal, Greece, and Poland. These countries are under the principle of *societas delinquere non protest* which is the concept that does not accept the idea of having the legal entities to be liable for criminal offences. But lately, there

is tendency that those countries will accept it more and more. So, before the declaration of the Criminal Code of 1992 which has been effective since March 1, 1992, the French Supreme Court had never punished the legal entities for any offences according the Criminal Code. Likewise, after the determination of liability for criminal offences of the legal entities in the Criminal Code of 1992. The French Supreme Court punishes not only cases that are defined by special laws but also punishes the legal entities for offences according to the Criminal Code under the criterion defined in the Criminal Code of 1992 including offences done by intention or some offences caused by negligence.

Anyhow, even though the principle of liability for criminal offences of the legal entities as legislated is matching with the concept of Identification Doctrine. The legislative court of France had adopted such principle and legislated clearly, so that the court is able to punish the legal entities correctly according to the juristic methods of Civil Law System. More importantly, the legislative court had done their duties of legislation while the justice applied the law defined by the legislative court without punishing the legal entities beyond the cases legislated by law. The approach to solve the problem of liability for criminal offences of the legal entities of France by adopting the Common Law to legislate in the French Criminal Code is considered as accepting a different law system into their systems without conflicting to their juristic methods. This is the interesting principle to apply in order to develop Thai's Law System. That is, Thai Supreme Court had applied the Common Law into the judgment and punished the legal entities for criminal offences without having the support of law which is against the juristic methods of Thai law which is the Civil Law System because unlike the Common Law; the court cannot place the law or judge-made-law.

By the way, the important criteria to be considered is starting whether it is the action of employment or not, the academics have explained as criteria that it will have to consider the relationship between the actions that causes the damage to the duty by checking from the condition of job and the violation, that is, to check whether the existing cause is the result of performing or not. The French Court has ruled by applying the relationship between the actions that causes the damage to the duty that if such

action is not related to the performing of duty, it is not called as the action on duty such as a car driver has collapsed with other car. There is an argument that who is right or wrong, then the car driver punches the other driver. Therefore, the employer is not liable for the violation of a driver punching with such other driver because it is not related to the performing on duty. Thus, in consideration of the characteristics of the action on duty of employment will have to consider the relationship between the actions that cause damage to the duty as well.

For the theoretical concepts associated with the liability that a person must have the guilty and the liability that such person shall not be guilty, are shown as follows;

“In principle, a person that has to be liable for violation, it will have guilty of violation of its own. There is a person who does the violation and the liability is the same person which endorsed with the principle and the rationale. Thus, the liability in the action of violation. It is the liability that desires the guilty or called as Subjective Responsibility. However, according to the law development if such principle is used, even a person who violates guilty and is liable to pay the compensation to the victims. But, a person who violates may not be in a position to pay the compensation for damage to the damaged person. This lets the damaged person is not healed and injustice. It creates the idea to let the other persons who are associated with some matters that a person who violates is jointly liable or on behalf of a person who violates. This creates the idea of principle of liability without guilty or called as Objective Responsibility. This lets a person who violates and a person who will be liable are different ones.”

In addition, it is able to extendedly elaborate on the liability for the violation of the employer which is liable called as Objective Responsibility that the characteristics of this liability occurs in 2 types: 1) Direct liability (Direct Responsibility) which is the liability of the employer occurring as soon as the employee violated without the opportunity for the employer to prove otherwise (which is the characteristics

of the liability under the French Code) and 2) Indirect liability (Indirect Responsibility) which is the liability of the employer because the selection of employees is not good by the employer including poor caring for the employees which open the opportunity to let the employer to prove that it is not liable because the selection of employees is good.

Therefore, it can be said that in France, the theoretical principle about Objective Responsibility or known as Secondary liability has been brought up to describe the liability of internet service providers which will be liable due to the violation of trademark, copyright and patent caused by the actions of the internet users both it does not violate direct violation in manner of Subjective Responsibility.

#### 4.3.2.5 Japan

When the juristic person is obliged by liability on causing damage to the others due to the mentioned unbound scope of the objectives by person in the juristic person, it is required by law Section 76<sup>622</sup> para 2 provided that the juristic person as well as the juristic person's representatives, other authorized persons or actors under the given authorization shall be responsible for the payment of compensation to others.

Concerning the matter of performing the duty under the employment, the Japanese Civil Code, Article 715<sup>623</sup> and the German Civil Code, Section 831<sup>624</sup> as the original source of the provision of Section 425<sup>625</sup>, identifies that if the employer has used reasonable care in hiring the employee and supervising such job or work or such loss or damage will be occurred in spite of taking reasonable care, the employer is not liable. But, the British Court does not consider that good control of employer is an excuse to get rid of liability. By the way, Thai law has cut off the cause not to be liable because of good control. Still, the employer is liable for the result of violation by the

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<sup>622</sup> See Footnote No. 71

<sup>623</sup> See Footnote No. 601

<sup>624</sup> See Footnote No. 602

<sup>625</sup> See Footnote No. 323

employee's action of the employment, absolutely. The employer will not refer to claim that good control to be cause for exception of liability.

In relation to the legal concept base of determination to let the employer is liable at the relation base in the legal relationship according to the hiring contract between the employer and the employee as the key point. By this way, in consideration whether the employer is liable or not, it is considered that such violated action is in term of violation of employment or not being the main point. The issue is how to consider that it is the case of the employee violates such employment, it will need to consider the opinions of academics attributing the court judgment.

Questions risen when considering liability throughout the lines of commands, it is found that the juristic person's liability under Article 44 is considered as the Primary liability which is responsive by the performance of the juristic person. The concept of the Organic Theory is held in Japan that the performance of the juristic person's representative is as of the juristic person's action but only Article 44 and Article 55 setting apart from its. It is believed that the company directors are also the juristic person's representative or even part of it is not by itself making the responsibility of the directors on behalf of the company in any performances as of the juristic person as the company. It other persons in such the juristic person are in accounted, the juristic person's liability is unavoidable as a status of employer associated with the Primary liability between them. The juristic person's liability can be taken into account against the managers (directors), or other representatives in order by ways of the liability on assignment or under engagement of written forms of acknowledgment between the representative and the juristic person in general.

#### 4.3.2.6 Germany

Questions risen when the juristic person's liability (Association) law that accounted for, it is provided by law that the liability is against performance acted by a board of directors, directors or other representatives who are appointed by the juristic person (Association) but not include any employees who cause to damage upon the

others. Since, it is provided as the Vicarious liability in particular in Section 831 and Section 26 provides onto a board of directors who are the juristic person's representative of the juristic person (Association) along with Sub-Section 1 that the juristic person (Association) requires a board of directors whose status are regarded as the juristic person representative and intention on behalf of the juristic person expressed inside or outside the court.

However, the scope of the juristic person representative's authority is limited by the regulation of the juristic person to protect the outsiders. At the same point, the intention of the juristic person is always expressed by the majority vote but only one expressed in the juristic person is considered as complete manners. The liability is effective by law and in responding to assignment on the operational business of the juristic person. In Section 31<sup>626</sup>, is not limited to an offence of the infringement and it is not a law in Section 27<sup>627</sup> against the offence of the infringement. After, the juristic person has paid to the others for any compensation. Should it be entitled to regain its loss from a board of directors, directors or other representatives? In Germany, the Organic Theory is fundamental in the Civil Law System in the common way. The juristic person representative always expresses a status of person in the juristic person.

The German Civil Code declines to accept the unbound scope of objectives (*Ultra Vires*) which is related to the UK Legal System. In consequence, the juristic person's liability under Section 31 in term of the Vicarious liability of performance acted by the juristic person's representative is always of the juristic

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<sup>626</sup> German Civil Code, Section 31 Liability of an association for organs

The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which or he is entrusted, where the act gives rise to a liability in damages.

<sup>627</sup> See Footnote No. 576

person's action. Hence, the regained loss from the juristic person's representative is not allowed by law.

However, the juristic person is provided other legal practice on regaining its loss in compromising with other lawful instruments based on contracts between the juristic person and actor who cause some damage. The juristic person's liability is also accommodated in the German Civil Code Section 31a<sup>628</sup> against the juristic person's representative and a limit of liability of the juristic person's representative issued in an amendment of the current German Civil Code (German Civil Code: last amended by statute of 28 September 2009) which the liability of a board of directors as the juristic person representative under Section 31a providing that; (1) Members of a board of directors who do not receive wages or earn a few wages for their activities which do not exceeding 720 euros per year, they are liable for the juristic person (Association) for any compensation during course of the employment as his or her status in a board and only who acts deliberately or in severely negligence. This also is applied to any liability against the members of the juristic person. (2) In the case, that any members in a board of directors who are liable (for the juristic person) under Sub-Section 1, statement 1 previously is in accounted after the juristic person secures compensation for others, such member may plead claims on the juristic person (association) in order to be deprived from his or her engagement by law. (for the juristic person), but statement 1 mentioned earlier is unable to apply for any damage caused by his or her intention or severely negligence.

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<sup>628</sup> German Civil Code, Section 31a liability of members of executive bodies and special representatives

(1) If members of executive bodies or special representatives act free of charge, or if they receive remuneration for their activity which does not exceed 720 euros per year, they are liable towards the association for damage caused in performing their duties only in case of intent or gross negligence. Sentence 1 also applies to liability towards the members of the association. If there is a dispute as to whether a member of an executive body or a special representative has caused damage with intent or gross negligence, the burden of proof is incumbent on the association or on the member of the association.

(2) If members of executive bodies or special representatives are obliged under subsection (1) sentence 1 to provide to another party compensation for damage which they caused in performing their duties, they may demand from the association to be released from the obligation. Sentence 1 does not apply if the damage was caused with intent or gross negligence.

Aforementioned has explained accordingly when members in a board of directors; its status is as the juristic person's representative, performs by his or her authority and unfortunately causing damage to the juristic person or members in the juristic person, such juristic person's representative is liable for the juristic person or members unless Section 31a providing the limit of liability of the juristic person's representative who acts for it and earns a few wage or no wage in providing that such juristic person's representative should be protected. In turn, the liability of the juristic person's representative in particular is accounted for only by acting deliberately or in severely negligence in compliance with Section 31a added by the liability of the juristic person representative who causes some damage for the cost made by juristic person to others under Section 31a. Such juristic person's representative who also works for the juristic person by earning or no wage can claim for his or her deprivation from liability of compensation for the juristic person but not include those who act deliberately and in severely negligence. This may be appropriate for the juristic person to plead for the liability of the juristic person's representative under Section 31.

However, the result of analysis in this chapter can be summarized by the following table;

	<b>Judgment</b>	<b>Vicarious liability</b>	<b>Manslaughter case</b>	<b>Exception</b>
<b>Thai</b>	Use the written law as the way to judge corporate criminal case. The corporation will be punished according to the law has provided. Or it can say that, No crime nor punishment without law.	The principle of Alter Ego Doctrine has used in Thailand in order to impose penalties for the corporation crime which can be considered the Criminal Code, Section 70.	The objective of Intra Vires will be identified in order to judge the criminal offense of the corporation in terms of manslaughter case.	In some cases, if a fault occurs is not specified in the law, there will be no penalty because there is no other penalty in the Criminal Code or the Juristic Method.
<b>UK</b>	Even there is no statutory law used in the common law, UK use Judge-Made-Law as the principles of judgment according to the doctrine of precedent.	Use the principle of Vicarious liability and Mens rea as the way to judge the corporate crime.	The Corporate Manslaughter case will be judged by focusing on Mens rea.	The corporate criminal case that not shows the real purpose of the entity, the acquit will be used in order to judge those corporate criminal case.

	<b>Judgment</b>	<b>Vicarious liability</b>	<b>Manslaughter case</b>	<b>Exception</b>
<b>USA</b>	Even there is no statutory law used in the common law, USA use Judge-Made Law as the principles of judgment according to the doctrine of precedent.	Consider the representative of the corporation by focusing on the principle of Alter Ego Doctrine.	The court will be used the principle of the directing mind and will of the entity in order to indicate the punishment of the entity.	The exceptions will be determined case by case.
<b>Germany</b>	Due to the German Criminal Code, Section 30 indicates that the entity cannot do the criminal offense because the entity is intangible and must be done the offense through the representative only.	The German law does not consider the offender through the representative. However, the court will consider the fault by intent (German Criminal Code, Section 315).	The action that cause harm to others will have to be taken into consideration through the primary intent. However, German Criminal Code, Section 23(3) states intent refers to the wills of the offenders.	In some cases, if the Court cannot prove the criminal offense is related to the intent of the entity, the corporation must not have been convicted criminal according to the German Criminal Code, Section 276.
<b>France</b>	In order to judge corporate criminal case, France uses principe de specialite.	Use the Code Penal 1992, Section 121-2- principe de rattachement de l'acte a la personnel morale (considered an offense related to or associated with the entity).	Due to the Code Penal 1992, Section 131-37, the punishment of the crime done by the entity will require fine as a means of punishment. Fine has been specified in Section 131-38 Some company must be closed if they have a serious criminal offense according to Code Penal 1992, Section 131-39.	The corporation will need to be considered harmful in some cases by using the Code Penal 1992, Section 121-2 - Principe de specialite.
<b>Japan</b>	There is no specifically to identify criminal penalties for the entity in Japan. However, the corporate punishment will be indicated according to the laws of German and France.	Only fine can be used to indicated the punishment for the entity if that offense is affecting others.	Same as the liability.	The exceptions will be determined case by case.

#### 4.3.2.7 Analysis the problems of Thai Legal Principles

From the table above can analyze that, In Thailand, the juristic person is engaged with legal relation in intention for a juristic act. According to, Section 76 provides that “the juristic person is liable for compensation on any damage” associated

with Section 70 which provides that “the will of the juristic person is always expressed by the juristic person’s representative.” When there are some disputed matters for any consideration on if the juristic person is engaged with legal relation in the intention for a juristic act of a person. The case may be considered whether a person who intends to act in a juristic act is the juristic person agent on behalf of the juristic person under Section 70<sup>629</sup>. If it is, a juristic act by an intention of such person is engaged with the juristic person. The essential law under Section 70 is useful for reference on the legal binding of the juristic person act like a contract. Although, it is not referred in Section 76, paragraph 1<sup>630</sup>, the judge may use of the case with application of Section 70.

Under Section 76, it can be applied when the juristic person agent or the authorized person act in any damage to other party making a liability of compensation. The provision is similar to the Japanese Civil Code Article 44<sup>631</sup> and the German Civil Code Section 31<sup>632</sup> for the juristic person’s liability of some compensation but not the principal of a legal relation of the juristic person. The consideration on the engagement a contract requires an application of Section 66<sup>633</sup> and Section 70 on grounds. The disputed matter occurs when the undersigned claims for an offence of the infringement against the juristic person by the contract. The judge ruled that the juristic person who is charged against the infringement of the contract is engaged with a payment for debt under Section 70 associated with Section 76. The Supreme Court, Decision No. 807/2510<sup>634</sup> described the plaintiff filed the first defendant as the juristic person who is engaged with a purchase and sale contract for a payment of the price with interest.

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<sup>629</sup> See Footnote No. 198

<sup>630</sup> See Footnote No. 71

<sup>631</sup> See Footnote No. 540

<sup>632</sup> See Footnote No. 616

<sup>633</sup> See Footnote No. 278

<sup>634</sup> See Supreme Court Decision No. 807/2520, Thai language version (<http://www.deka.in.th/view-34431.html>)

The mentioned case was not a claim on any damage for some compensation against the juristic person's representative that directly a breach of the contract. But, the judge ruled in favor of the plaintiff that the juristic person is liable for a payment by the market price and interest under Section 75 (former) associated with a scope of objectives under Section 69 (former) as well as Section 76 (former). The author agrees with the judgment since it was not concerned only some compensation to be made from the juristic person's representative or the authorized person who act on behalf of the juristic person in any damage to others but a payment of debt ignored by the juristic person of the contract causing some damage to the others.

The author discussed about the legal binding under the juristic act if the law can force the juristic person to engage with the legal relation by intention of the juristic person. According to, Section 66 providing a scope of objective or the juristic person's authority under Section 70 providing the intention of the juristic person acted by the juristic person's representative is also referred to a provision under Section 76 applied by the judge, which provides the liability for any compensation made by the juristic person who ignored to pay debt by the engaged juristic act.

Consider the normal working in its functional position found that the characteristics of the normal work in its functional position is a criterion based on the usual consideration on the relationship between the duty of a representative or an authorized person on behalf of which is cause of damage. There is the criterion that the Supreme Court and many academics accept to consider whether the infringement is the violation of employment or not. The author agrees in correspond with to bring such criterion into further consideration that is let consider a representative or an authorized person on behalf of has normal function from being a representative or an authorized person on behalf of and consider for supporting whether the action which causes the damage resulted from being acted according to normal function of a representative or an authorized person or not. If the action that causes such damage is the result of performing normal function, it is regarded as "it is the action on duty of a representative or an authorized person on behalf".

However, the relationship between the juristic person and a representative or an authorized person on behalf is the relationship occurring in many characteristics, not limited only to the relationship due to employment contract. It may be also the legal relationship such as a case of the rector of private higher education institution has made the employment contract for hiring the workers as its employees of the university before assuming a position of university rector. The rector has also authority under the law and under the employment contract, or in case of the company board of director has bound the legal relationship with the company under the labor employment contract. In addition, if considering the issue on the characteristics of the action of the juristic person is liable under Section 76, it will be seen that the cause of action that the juristic person will have to be liable under Section 76 has wide scope, not only limited to the infringement.

Thus, under consideration, it will have to consider the occurring damage due to which the cause is from such as violating, misconducting the contract, managing off the order or undue enrichment, etc. Because if the cause of action is different, it may affect the relationship between the function and duty of a representative or an authorized person on behalf of with the action which causes of different damage.

Concerning consideration under such criteria, it should cause the fairness both a representative and an authorized person on behalf of because it has done its normal duty, which is the normal duty. In principle, it will be for the benefit of the juristic person. When the juristic person gets the benefit, it should bear the risk of liability to the third person. At the same time, it will be the protection for the outsiders to get the opportunity for healing more damage, when it has been damaged due to the trust that a representative or an authorized person to act on behalf of the juristic person. This is able to list the examples as follows:

A case study: The staff who is employed of Thailand Post Company Limited, acts on duty to provide the deposit from the sender and then proceed to issue the document for payment which is called the money order. It appears that it specifies

the wrong address of the recipient with carelessness. This lets the money order not arrive on time until it gets damaged. In this case, it is regarded as the staff has authority to act on behalf of the juristic person because it has its duty as the key part of operation according to the purposes of Thailand Post Company Limited, and has done its normal duty that causes the damage to the others.

A case study: A case of company limited operates a steamship to send the goods and handles the sailing into Thailand. Considering to get the goods for import is the responsibility of the board of director. When the board of director considers receiving and sending the goods which are excess weight based on the criteria standard of receiving the weight of the steamship, and has ordered the cargo on board in spite of it knows that the distance for sending the goods is too far and the ship by condition is not able to stand up to such weights. It also forced to transport such goods. In this case, the board of director as a representative is careless and causes the ship collapsed, the goods get damage. This is regarded as the action of duty of the representative.

Therefore, if it is a case of a representative or an authorized person to act on behalf of the juristic person acts on its normal duty, and from being acted this duty. It results to make the cause of damage with no evidence of any fact that a representative or an authorized person to act on behalf of has performed while it turns to its personal business, intentionally violates the law, causes the damage and acts by violating the rules, disciplines and orders of the juristic person or acts on duty with having personal motive or exploits for its own as personal benefit. It is considered as “the action on duty of a representative or an authorized person on behalf of” under Section 76.

In the case of being the working in its function as assigned to act is the criterion for considering the characteristics of action to violate the employment. The court considers the duty extension under the employment contract as well as the other duties as assigned in addition to the duty that the employee has generally made. The author recommends that concerning the court has extended the scope of this duty of employee, it should be the reason because the job that the employer assigned to do later

on, actually it is the employer's job. When the employer has authority to compel the employee, the employer will be able to take any actions. If such order is not the illegal order, especially when the employer has ordered or assigned to act by the employee itself, it is considered that such assigned job is the employed job. In adopting such criterion for applying to the duty of a representative or an authorized person on behalf of, the author recommends that this criterion is able to be a criterion in the same way.

Even though, the relationship between the juristic person and a representative or an authorized person on behalf of will be the relationship occurring in many characteristics, not limited to be the relationship arising from only an employment contract. However, when a person in status as a representative or an authorized person on behalf of juristic person. In principle, it's like the identity of the juristic person, acts on behalf of the juristic person. Thus, if the juristic person will assign to perform other duties than general duty within the objective scope or authority of juristic person, it is always able to act. This is regarded that such duty assigned is the duty of a representative or an authorized person on behalf of. If such action on duty assigned causes the action to be damaged, it will be considered as "the action on duty of a representative or an authorized person on behalf of juristic person" under Section 76.

In accordance with consideration on such criterion, it will likely provide the fairness to the 3 parties involved; a juristic person, a representative or an authorized person on behalf of and the external person which is able to list the example as follow:

A case study: A company's employee in a position to control the production process, but he has been assigned to inspect the quality of the product. When the quality of product approved for sale to customers is low, it causes the customers to get damage. The company will have to be liable because it is regard as the employee having authority on behalf due to it has duty as an important part of business operation according to the scope of the company. When such duty assigned causes of liability

arising from misconducting of the employment contract because of the defects of selling and buying assets, the juristic person will have to be liable.

A case study: A case of Subcommittee of the limited company which is assigned by the committee to perform the advertisement of a new product that the company is diversifying into the new markets. It appears at the Subcommittee's meeting, it has designed and advertised by using the pictures which are the creative work of others, searching from the internet. It does not check whether it is the copyrighted work or not. Thus, the copyright owner is able to claim the company for being liable as copyright infringement because it is the action on duty assigned of the representative which causes the action to get the damage.

In summary, in case of a representative or an authorized person to act on behalf of its duty as assigned and from being acted this duty. It results to make the cause of damage with no evidence of any fact that a representative or an authorized person to act on behalf of has performed while it turns to its personal business, intentionally violates the law, causes the damage and acts by violating the rules, disciplines and orders of the juristic person or acts on duty with having personal motive or exploits for its own as personal benefit. It is considered as "the action on duty of a representative or an authorized person on behalf of under Section 76".

The court has identified the criteria for consideration in this clause whether it is the violation of employment or not. If such violation occurs because of the action on the other duty which is not the usual duty of the employee, but it is the duty occurring due to the action on its normal duty. The court places the guideline to rule that if the action on other duty is the duty that it is able to perform in order to get normal duty, successfully. It is regarded that such continuing other duty is the duty of the employee as well. It will be seen that in considering this guideline, the court plays key attention to the action on normal duty to accomplish its normal duty of the employee, successfully. This is because in some cases under the scope of employment, the employer is unable to identify the work characteristics in coverage at all aspects. The

work of an employee may be appeared the fact later which lets the employee perform other duties.

However, whether the other duty is considered to be the continuation or not, it is to consider the connection with the normal duty because if it is not connected, it is considered as the action outside its duty.

The author recommends that the criteria for consideration of this clause can be applied to consider the scope of the duty of a representative or an authorized person to act on behalf of the juristic person as well. This is able to identify the criteria for consideration of the continuing action on duty, clearly, as follows:

Firstly, it must be a case appearing the fact or some behaviors that the cause to let a representative or an authorized person is able to intervene into working on other duties. It is not to intervene into working on the other duty without no evidence of the fact which it causes to work on the other duties. Otherwise, it will be the action on duty outside its duty.

Secondly, when appearing the facts as clause, a representative or an authorized person to act on behalf of makes decision to work on the other duties by having motive for the benefit of the juristic person. This considers from the behavior supporting the action to work on the other duties for its normal duty, successfully. If it considers that the action to work on the other duties for its normal duty but it is not for the benefit of the juristic person. On the other hand, it is for the benefit of a representative or an authorized person on behalf of, personally. The other duties shall not be the duty for the continuation of the normal duty of a representative or an authorized person on behalf of the juristic person.

Moreover, consider the working on duty in violation of regulations, rules or orders of the juristic person can analyze that, in this matter, if it is the guideline for considering the characteristics of the action on duty which the court has applied to rule the liability of the governmental agencies in cases of the State Officials violating before

the applicable law is effective of the liability for Wrongful Acts of Officials, B.E. 2539 (A.D. 1996). The court has ruled based on the guideline concept of Section 76<sup>635</sup>, but by the comparison of the ruling criteria in matter of employment. The court considers that in some cases, the official as an authorized person has acted in its duty, but it neglects some steps according to the agency's regulation specified. If the action violating such regulation is still the action on duty and has acted for the benefit of the agency. Although, the official violates the another person at that time, the court considers that this case is considered as it is the action on duty.

In terms of performance on duty considered as intent of criminal offences. It is noted that the juristic person's representative or the authorized person may perform in a scope of his or her duty but acts as deliberately infringe by law, especially by the criminal offence. According to Section 422<sup>636</sup>, it provides that it the damage caused by any offences of protection other from something. It is considered as an offensive person of the representative or the authorized person. Sample was an employed driver for the public security foundation drove through the red light by intent of action causing damage to other driver's car. Even, the directors of the hotel hire an engineer to construct the hotel without following the construction control regulation till the collapse of the building that caused the death and casualty of workers as many as an offence of the infringement of the directors of the sale company for the counterfeited cell phone brands which was exploded to cause casualty. In the latter case, it is a criminal offence of fraud ground against the buyers and an offence of the infringement against the customers at the same time. It is disputed matter if all mentioned actions are "performance on duty" of the juristic person's representative or the authorized person.

The jurists explained the principal ideas of an offence if it is caused by duty which is considered as intent of a criminal offence, negligence, dishonesty or

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<sup>635</sup> See Footnote No. 71

<sup>636</sup> See Footnote No. 611

malpractice of duty by law, all performance are not lawful duty but the employer's liability of an offence of the infringement.

Besides, the case is always considered as duty in a scope of objectives or authorities hence the juristic person cannot discuss on his or her own objectives are without performance of offences. However, when the juristic person's representative or the authorized person acts deliberately violate to achieve a scope of objectives or authority, the juristic person always takes part of that action which may cause damage.

It is suggested by the author whether the intent of an offence of duty can be considered by the principle as follow:

Firstly, the juristic person's representative or the authorized person acts deliberately to achieve duty by the regular basis if he or she does not perform such duty; the damage from action as intent of offence made by him or her.

Secondly, based on the duty acted by such person in, it is considered if the violation against the law is for the benefit of the juristic person or not rather personal benefits occur with angers, argument or slander, etc.

The principle above when proven is the juristic person's liability for the juristic person's representative or the authorized person under Section 76. Samples are as follow:

Case study: When the dispute occurs under the Labor Relations Act, B.E. 2518 (1975), the law provides that the strike of labor can be acted but not include the unsettled dispute which requires the general meeting of the labor union with vote counts of half of the total votes conducting as a secret vote under the Labor Relations Act, B.E. 2518 (1975), Section 103<sup>637</sup> but during the unsettled dispute, the chairman given authority by the labor committee order the strike without the resolution meeting.

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<sup>637</sup> Labor Relations Act, B.E. 2518 (1975), Section 103 The labor union may undertake the following acts upon a resolution of the general meeting;

It was obvious that the labor representative acted deliberately against the Labor Relations Act. It is the union of labor's liability for the damage of the employer on this basis.

The author argues that only Section 422 may also be a criminal offence. Hence, the punishment measure should apply to an offence against the juristic person representative or the authorized person with the juristic person, which can be claimed by the other party. However, the intent of criminal offence was not covered by the condition under the 2 principles describing that the juristic person is not liable for any damage since it is not considered as the juristic person's representative or the authorized person's actions except only when such person act deliberately in term of Contributory liability which are consisted of 2 issues, namely, 1) the juristic person is known about such person's actions and 2) the juristic person's contribution or participation is proven as an offence of such person's actions.

In term of acknowledgement, it is divided into "Actual knowledge" and "Constructive knowledge" which is defined by the Black's law dictionary in that "if a person should be acknowledged something, that person is considered as known of its." In fact, the juristic person does not exist, so the expression is performed via the juristic person's representative. When the juristic person takes part in term of the Contributory liability in direct or even sportingly, it is disputable if the action of the juristic person's representative is considered. The author added that the juristic person's liability and its Contributory liability should be limited to obvious action seen by others. Otherwise, the abstract considered in mind of the juristic person's representative may be unjustified to

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- (1) to amend its regulations;
  - (2) to perform any act which may be detrimental to common interest of its members;
  - (3) to elect director or auditor, or to certify balance sheet, annual report and annual budget;
  - (4) to allocate money or properties to be welfare of its members or public interest;
  - (5) to dissolve the labor union;
  - (6) to merge with other labor unions;
  - (7) to establish or being member of the employee federation;
  - (8) to strike in the case where there is and unconcluded labor dispute under Section 22 paragraph three. In this case, the voite for the strike shall be made by secret ballot and a resolution is made by more than one-half of the total number of members of the labor union.

other persons of the juristic person. Therefore, the analysis of punishment for Corporation Liability Offense can be analyzed as follows;

Firstly, when it is proven that the juristic person's representative or the authorized person acts deliberately against a breach of contract, the juristic person is liable to pay for compensation to other party's damage since the juristic person is as the undersigned in the contract always responsible for the payment of debt. The manner is in responding with the Civil and Commercial Code Section 220<sup>638</sup>.

Secondly, when the performance is in term of management of affairs without mandate, the juristic person is always liable for the juristic person's representative or the authorized person's actions.

Thirdly, when the performance on duty considered as intent of civil offences but suit the requirement of benefits of the juristic person. Therefore, the juristic person is liable for the juristic person's representative or the authorized person's actions.

Fourthly, when the performance on duty considered as intent of civil offence of damage by a chance of a payment of debt. Therefore, the juristic person should be liable for the juristic person's representative or the authorized person's actions from causing damage of a breach of contract.

By law, it is noted that performance acted by any person may be liable for an offence of the infringement and a breach of contract at the same time meaning covered damage in term of rights and entitlements by the contract under the relative law. Therefore, when the performance on duty is considered as intent of civil offence against damage of others but in a scope of objectives with benefits of the juristic person in direct or indirect ways. The juristic person's liability is accounted for such offences.

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<sup>638</sup> Thailand Civil and Commercial Code, Section 220 A debtor is responsible for the fault of his agent, and of person whom he employs in performing his obligation, to the same extent as for his own fault. In such case the provisions of Section 373 have no application.

At the same time, the condition is additional distinction from the previous when the victim has no legal relation with the juristic person but rather actions of the juristic person's representative or the authorized person in intent to act against offence by his own motive for personal benefit or even a slander of other due to his or her own wrath. Hence, the juristic person is not liable for the infringement of the juristic person's representative or the authorized person.

In the case, the employed driver drove the public bus observing his foe walking along the road; he did hit that wounded person with wrath. The public driver as the authorized person performed his duty considered as intent of a criminal offence while the foe had nothing to do with the juristic person's legal relation of any contract. In consequence, the juristic person is not liable for his action on this basis ground.

In summary, the author added under Section 76<sup>639</sup> which provides the performance of the juristic person's representative or the authorized person considered as intent of an offence of the infringement against other's damage while under Section 420<sup>640</sup> providing the performance of the violation as well as Section 398<sup>641</sup> providing an offence of management of affairs without mandate or a breach of contract in general. It is suggested as follow:

1) Performance on duty considered as intent of civil offences against other's damages causing a breach of contract.

2) Performance on duty considered as management of affairs without mandate in order to protect someone from threats, although it is considered as an offence of the infringement.

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<sup>639</sup> See Footnote No. 71

<sup>640</sup> See Footnote No. 610

<sup>641</sup> Thailand Civil and Commercial Code, Section 398 If the management of the affair has for its object the averting of an imminent danger which threatens the person, reputation or property of the principal, the manager is responsible only for willful default and gross negligence.

3) Performance on duty considered as intent of civil offences in order to maintain benefit of the juristic person but without own profits, slander of other or wrath.

4) Performance on duty considered as intent of civil offences against the other's damage by a chance of a payment of debt by the contract made between them.

On the contrary to the previous condition, such persons who perform a duty for his or her own benefits are personally liable for the actions of his or her own. Therefore, the juristic person is not liable for the infringement.

4.3.2.8 The evaluation of the Foreign Law that can be used as a guideline for the Legal Principles and the Punishments for Corporate Criminal Liability in Thailand.

To punish the juristic person in foreign countries, Thailand can apply relevant laws including both Common and Civil Laws. Normally, the concepts and the punishments for the juristic person of both laws are different. Under the Common Law, Thailand can apply American and British laws to punishing the juristic person. Under the Civil Law, Thailand should apply French law to the punishments. However, the following issues can be analyzed in order to set the punishments in Thailand.

In the United States (US), there are problems and solutions about the juristic persons' liabilities that are similar to those in the United Kingdom (UK). This is because the United States is influenced by the British Common Law. In other words, there is no clear law stating this kind of punishment in the United Kingdom. In the United Kingdom, there is the Interpretation Act with Section 2(1)<sup>642</sup> stating that the word, "individual(s)", in acts with criminal punishments either set before or after this act also refer(s) to the juristic person. Afterwards, the juristic person under the British law can have almost of types of criminal liabilities including liabilities for intentional

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<sup>642</sup> See Footnote No. 396

actions. This does not include some liabilities that cannot be applied to the juristic person. An example of laws stating punishments for the juristic person is provided here. Section 8(2) of the Patents Act 1949<sup>643</sup> states as follows. “by violating this act, the punishment is fine. For the first violation, the fine will not be higher than 12 ponds. For the second and other following violations, the fine will not be higher than 50 ponds.” It can be seen that the severity of punishments is dependent on the effects and severities of the juristic persons’ acts on the society. For example, the Official Secrets Act has more server punishments than that of the Monopolies and Restrictive Practices Act 1948<sup>644</sup> and Patents Act 1949.

Generally, many countries using the Common Law are facing problems in punishing the juristic person because the juristic persons’ liabilities cannot be identified. This is because the juristic person does not have minds and feelings as individuals. The juristic person is abstract and cannot be investigated in criminal cases. With these problems, the criminal punishments did not include the juristic persons’ liabilities. This might refer that the juristic person did not have criminal liabilities. Similarly, it can be stated that the juristic persons’ liabilities under the Common Law considers that an individual’s criminal offense must consist of an illegal action or violation (*Actus*) and blamable mind. This consideration complies with the principle that the act does not constitute guilt the mind be guilty (*Actus non facit reum nisi mens sit rea*). This also considers *Mens rea and Actus reas* (i.e. action) in order to consider whether or not to punish the individual.

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<sup>643</sup> Patents Act 1949, Section 8(2) If it appears to the comptroller that the said invention is claimed in a claim of any such other specification as aforesaid, he may, subject to the provisions of this section, direct that a reference to that other specifaicaion shall be inserted by way of notice to the public in the applicant's complete specification unless within such time as may be prescribed either

(a) the applicant shows to the satisfaction of the comptroller that the priority date of his claim is not later than the priority date of the claim of the said other specification; or  
 (b) the complete specification is amended to the satisfaction of the comptroller.

<sup>644</sup> The Monopolies and Restrictive Practices Act 1948

Under the Common Law, Originally the juristic person did not have criminal liabilities. An obstacle in considering criminal cases of the juristic person is intentions. In some cases, the juristic person cannot have offenses such as treason, homicide, rape, fraud or felony. In some other cases, the members of the companies or the juristic person such as committees or managers have different liabilities from that of the juristic person. Regarding this issue, the Chief Justice Holt of U.S. agreed with the original principle of the Common Law, which considered that the juristic person could not be sued. Moreover, the Supreme Court of the United States considered that the juristic person do not have offenses caused by intentional actions because it is abstract and immovable. It also agreed that it should not have criminal liabilities according to the 5 following reasons for its punishments.

Firstly, the criminal punishments for the companies or the juristic person is usually ineffective because only its profits are diminished by being fined. The juristic person can handle these punishments by pushing its burdens to consumers, for example, by increasing its service charges or product prices.

Secondly, by punishing the juristic person, shareholders are indirectly punished. In other words, the shares of large-sized the companies and the juristic person are held by many shareholders. Consequently, the shareholders are affected by the punishments. That is the innocents are indirectly punished.

Thirdly, if the juristic person has criminal liabilities. Then the companies or the juristic person can be defendants for real culprits such as the juristic persons' representatives or managing directors. This is because it is accepted that the juristic person does not have minds and it cannot take actions. Therefore, it must take actions through its representatives. Thus, the individuals directly take the actions should be punished.

Fourthly, eliminating culprits who illegally seek to benefits is not an objective of criminal law. Normally, fine cannot be related to illegal seeking to benefits. Hence, it seems that fine is not appropriate for criminally punishing of the juristic person.

Fifthly, criminally suing the companies or the juristic person does not clearly provide benefits for the public damaged by the companies' or the juristic persons' actions.

Since, the juristic person does not have criminal liabilities and it cannot be criminally punished, the researcher does not agree with this. This is especially for not punishing the juristic person. Regarding the third reason stating that punishing the juristic person cannot punish real culprits as well as suing the juristic person cannot provide benefits for the public. The researcher considers that the mentioned reason is not clear and correct. Put differently, actions usually are taken through the juristic person in order to gain high returns. Therefore, the number of illegal actions taken by juristic person is increasing.

Directly, punishing the juristic person will be useful for shareholders. That is, this warn shareholders to stop holding the shares in illegal companies. Without punishment, a number of shareholders will not know that the juristic person whose shares held by them violate laws. Nevertheless, for examples are the illegal actions of many American financial institutions or Real estate companies. The managers of the juristic person jointly defrauded and caused a financial crisis in U.S. Consequently, the financial institutes were close down. Eventually, the 18 U.S.C. Section 1344<sup>645</sup>, Bank

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<sup>645</sup> 18 U.S.C. Section 1344, Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

- (1) to defraud a financial institution; or
- (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Fraud was amended, for example, by increasing the fine from 10,000 U.S. dollars to 1,000,000 U.S. dollars and extending the longest imprisonment sentence from 5 years to 30 years. The shareholders will gain benefits from the criminal liabilities and punishments for the juristic person whose shares held by them. These illegal actions can also be found in Thailand.

For an idea that the juristic person should not be responsible for its representatives' or shareholders' illegal actions. The researcher considers that the fame and properties gained from the actions will be given to the juristic person. If the juristic person gains benefits from the illegal actions (this also includes the cases that the juristic persons' representatives or shareholders gain the benefits), then the juristic person, representatives and shareholders should be responsible for the illegal actions. An example is the Consumer Product Safety Act (15 U.S.C. Section 2070)<sup>646</sup>, which states that the companies' representatives and the managers must take responsibilities and receive punishments if they violate the law. Another example is *the case of the United States v. Holton Hotels Corporation (1972)*<sup>647</sup>, which the court decided that the juristic person must be criminally responsible for its employees' offenses. Even though, the employees took the illegal actions that they were not under the juristic persons' general policy. Similarly, the juristic person should be punished for crimes.

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<sup>646</sup> 15 U.S.C. Section 2070, Criminal penalties

(a) Violation of section 2068 of this title is punishable by—

- (1) imprisonment for not more than 5 years for a knowing and willful violation of that section;
- (2) a fine determined under section 3571 of title 18; or
- (3) both.

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 2068 of this title shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a).

(c) (1) In addition to the penalties provided by subsection (a), the penalty for a criminal violation of this chapter or any other Act enforced by the Commission may include the forfeiture of assets associated with the violation.

(2) In this subsection, the term “criminal violation” means a violation of this chapter or any other Act enforced by the Commission for which the violator is sentenced to pay a fine, be imprisoned, or both.

<sup>647</sup> *United States v. Holton Hotels Corporation (1972)*, The Defendant, Hilton Hotels Corp. was involved in an association in Portland that collectively agreed to give preferential treatment to suppliers who contributed money to the association. Though it was against corporate policy for the Defendant corporation to be involved in such a scheme, a purchasing agent for the corporation threatened a loss of business to suppliers if they did not contribute to the association.

For the reason, that suing the companies or the juristic person do not provide clear benefits for the public. It is obvious that this reason should be disproved since the juristic person can have criminal liabilities and receive punishments. This is clear that suing the juristic person committing crimes is suggested because the crimes affect the society more than that of the individuals as can be seen from the following example. Brovile Factory in U.S. producing toxins for nuclear bombs negligently let the toxins leak. Eventually, it was sued in a criminal case.

Not only, the above analyzes by the researcher, but some lawyers also consider that the juristic person should have criminal liabilities and receive punishments for its offenses with the following opinions.

Firstly, since the companies' or the juristic persons' actions are taken by individuals, the criminal liabilities are necessary because the individual may commit crimes if the juristic person gain benefits from their actions according to the juristic persons' objectives.

Secondly, although the shareholders or the juristic persons' representatives are criminally punished, the juristic person can continue its businesses and receive benefits from those persons' actions. Therefore, the juristic person should have criminal liabilities and receive punishments for the actions.

Thirdly, the juristic person has criminal liabilities because punishing individuals such as the juristic persons' representatives or shareholders are not appropriate and correct. This is because culprits should be the one being punished.

Fourthly, since, culprits should be punished, the juristic person is the culprits should be punished. This is because the one receives the benefits from illegal actions should be punished.

Fifthly, the juristic person should be sued according to the visions and wills of the public to sue culprits rather than individuals (or the juristic persons' representatives or shareholders).

Sixthly, punishing the juristic person is better than punishing individuals (i.e. human principals). Otherwise, the individuals' reputations may be damaged.

According to the mentioned opinions, it is supported that the juristic person can have criminal liabilities and receive punishments. This is because the United States starts accepting the important of the juristic persons' criminal liabilities and punishments. This is especially for illegal economic activities that do not only violate laws including the civil law and the governments' rules and regulations, but there are also criminal offenses. The criminal offenses are clearly dangerous for the society because the culprits want to gain benefits from illegal actions. Nonetheless, the offenses that are very important in the United States are money laundering, obstructing law enforcement by the government, tax fraud as well as damaging the society and environment.

Some offenses are committed because of the companies' or the juristic persons' illegal policies that do not concern the benefits for the public or the juristic persons' unethical actions damaging the other individuals or organizations. The United States instantly solved the problems of the juristic persons' criminal liabilities and punishments by setting the 3 following guidelines for controlling the juristic persons' actions. The first issue is the structures and visions of the juristic person must be voluntarily changed. That is, the juristic person must volunteer to honestly conduct businesses according to business ethics as well as have correct organizational structures.

Besides, the issue regarding the government wants to change the structures of the juristic person is the point that should be considered. In other words, the government involves in stimulating that the juristic person to improve its structures by promoting correct management and operation structures. For instance, the

government appoints some persons who can appropriately control the juristic persons' activities, effectively punish them and/or use measures (i.e. sanctions) with them. At the same time, the measures can control the juristic person or rely on consumers' actions in order to pressure the juristic person. For example, the consumers may stop buying the products or using the services of the juristic person committing offenses.

The statement mentioned above guidelines illustrate the participation between the public and private sectors in order to minimize the juristic person; offenses.

In the United States, the 3 guidelines are very popular. However, there was a doubt about punishing the juristic person in the United States, since it was accepted that juristic person can have criminal liabilities as accepted in the United States, laws regarding the liabilities were enacted. For punishing the juristic person, there is no conclusion about the appropriate punishments. Initially, this problem was solved by punishing the juristic persons' representatives. Afterwards, it was agreed that the juristic person must be directly punished. This is because whether the juristic person can gain many or few benefits from its actions, it can commit criminal offenses.

Consider the punishments for the juristic person analyzed by using foreign laws which can be used as the guideline for Thailand can discuss that, there are many types of punishments for the juristic person. There are many examples of the punishments such as fine, refutation, deprivation of rights, advertisement, courts' orders and probation. Common punishments given by American Courts are as follows.

Fine – this punishment directly affects the juristic persons' assets. The purposes of this criminal punishments are as follows: 1) to deter crimes or make the juristic person accept its offenses, 2) to proportion the offenses, 3) to protect and rehabilitate the society, and 4) to compensate for victims. However, the original criminal punishments for the juristic person in the United States could not meet the objectives of the punishments. Therefore, civil and/or other measures are used in order to

efficiently suppress crimes. Whether, the culprits are the juristic person or individual, they can be punished. In the United States (U.S.), fines for the juristic person is usually dependent on its financial statuses, benefits from offenses, and sizes.

Recently, the criminal punishments were severe in U.S. For example, the fine for fraud regarding procurement is 5,000 – 10,000 U.S. dollars or 3 times of the value of the damage. The fine for corruption of credits from financial institutions in 1984 was not exceeding 10,000 U.S. dollars or imprisonment not longer than 5 years. For years later, the fine was increased to 1,000,000 U.S. dollars. It was found that the fines for the juristic person was significantly higher than individuals. Fine is a measure used in U.S. in order to prevent the juristic person to commit crimes.

Probation – in the United States, the corporate probation is a main punishment that is less frequently used than fine; for instance, the Sentencing Reform Act of 1984<sup>648</sup>. Moreover, the juristic person may have to provide community services. It can be seen that this kind of punishments may be adjusted easily as compared to fine or pure probation because the juristic persons' shareholders and employees will not be in trouble. Probation measures are as provided as;

Firstly, assign the juristic person to provide community services according to its capacities; for example, by donation, community support, compensation for community workers or probation officers in order to conduct good activities for a certain period of time. In the case, that the courts delay the fine or imprisonment for the juristic person, the courts may use probation. For example, *in the case of United States V. Mitsubishi International Corporation, Union Pacific Railroad,*

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<sup>648</sup> The Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984, was a U.S. federal statute intended to increase consistency in United States federal sentencing. It established the United States Sentencing Commission. It also abolished federal parole. The act was passed by large majorities in both houses of Congress.

*and Burlington Northern, Inc.*, 677F.2d 785 (9<sup>th</sup> Cir. 1982<sup>649</sup>), the defendant in this case was a company violating the regulations about the freight rates for trains under the Elkins Act<sup>650</sup>. The court decided to fine defendant for not exceeding 20,000 U.S. dollars for all damage. The court deprived the punishment by using probation and fine for not exceeding 1,000 U.S. dollars. The court set a special condition for the company's managers and defendant to join the Community Alliance Program for 1 year and provide financial support of 10,000 U.S. dollars for the mentioned program in order to make the juristic person accept that its actions' affected the public and violated laws rather than only fining the juristic person.

Secondly, prohibit the juristic person to take any actions directly relating to offense that may re-occur. However, this must not absolutely prohibit the juristic person to earn a living or conduct its business as usual. Conditions may be set in order to establish checking or reporting system controlling law enforcement. Equipment may be appropriately installed or assigning the government's officers to monitor the juristic person who violate by law. For instance, releasing toxins into environments without correctly disposing the toxins in order to enforce the juristic person to restore the environments.

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<sup>649</sup> United States V. Mitsubishi International Corporation, Union Pacific Railroad, and Burlington Northern, Inc., 677F.2d 785 (9<sup>th</sup> Cir. 1982)

Mitsubishi International Corporation ("Mitsubishi"), Union Pacific Railroad ("Union Pacific"), and Burlington Northern, Inc. ("Burlington Northern") were indicted for numerous violations of the Elkins Act ("Act"), formerly 49 U.S.C. § 41(1) (now codified at 49 U.S.C. §§ 11903 and 11915). These were violations of railroad freight tariffs that resulted in special favorable treatment for Mitsubishi. Each pleaded guilty to violating the applicable freight tariff regulations imposed under the Act on cargoes shipped by rail. Mitsubishi pleaded guilty to nine counts of a twenty-seven count indictment; Union Pacific pleaded guilty to five counts of an eighteen count indictment; and Burlington Northern pleaded guilty to three counts of a nine count indictment.

<sup>650</sup> The Elkins Act is a 1903 United States federal law that amended the Interstate Commerce Act of 1887. The Act authorized the Interstate Commerce Commission (ICC) to impose heavy fines on railroads that offered rebates, and upon the shippers that accepted these rebates. The railroad companies were not permitted to offer rebates. Railroad corporations, their officers, and their employees, were all made liable for discriminatory practices.

Thirdly, adjust the management structures of the juristic person in order to prevent offenses to re-occur.

Finally, assign the juristic person to provide financial supports, for example, for charitable organizations. Then, court reduce fines as happened in the case of *United States v. Williams*<sup>651</sup>.

Forfeiture – in the United States, forfeiture is a kind of punishments for the juristic person. In other words, the Racketeer Influenced and Corrupt Organizations Act (RICO) and Continuing Criminal Enterprise (CCE) (18 U.S.C. Section 1963 and 21 U.S.C. Section 853<sup>652</sup>) use forfeiture in criminal cases by forfeiting all proceeds and benefits.

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<sup>651</sup> *United States v. Williams*, 553 U.S. 285 (2008), was a decision by the Supreme Court of the United States that a federal statute prohibiting the "pandering" of child pornography (offering or requesting to transfer, sell, deliver, or trade the items) did not violate the First Amendment to the United States Constitution, even if a person charged under the code did not in fact possess child pornography with which to trade.

<sup>652</sup> 18 U.S.C. Section 1963, Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing

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pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

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(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court

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for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

21 U.S.C. Section 853, Criminal forfeitures

(a) **PROPERTY SUBJECT TO CRIMINAL FORFEITURE** Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of [section 848 of this title](#), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

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(b) MEANING OF TERM “PROPERTY” Property subject to criminal forfeiture under this section includes—

- (1) real property, including things growing on, affixed to, and found in land; and
- (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) THIRD PARTY TRANSFERS All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) REBUTTABLE PRESUMPTION There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

- (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
- (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) PROTECTIVE ORDERS

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT. —

(A) In general. —Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United

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States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply. —Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) WARRANT OF SEIZURE The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) EXECUTION Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) DISPOSITION OF PROPERTY Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) AUTHORITY OF THE ATTORNEY GENERAL With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) APPLICABILITY OF CIVIL FORFEITURE PROVISIONS Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) BAR ON INTERVENTION Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

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(l) JURISDICTION TO ENTER ORDERS The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) DEPOSITIONS In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) THIRD PARTY INTERESTS

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) CONSTRUCTION The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) FORFEITURE OF SUBSTITUTE PROPERTY

(1) IN GENERAL Paragraph (2) of this subsection shall apply, if any property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

Victim information notification – regarding notifying victims in U.S., this punishment is a consequence of main punishment. It is only used in the cases of fraud. In these cases, the one being punished must inform victims about their offenses and punishments by post, newspaper or other media as appropriate in order to inform the victims and enable them to handle damage in time; for instance, taking victims to physicians if they are deceived to take dangerous drugs or checking relevant facts. In some cases, it takes long time and then become corrective advertising (i.e. advertisement for long-term solutions).

Compensation for damages – Since, American law was amended in 1987, compensation for damages has become a principle for all offenses. The compensation may be in the form of returning lost properties. In the case of physical injury or death, the court may decide that services are needed rather than monetary compensation if victims agree with the decisions. In the cases of probation, the court may decide that refusing to compensate is a condition for cancelling the probation or

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- (B) has been transferred or sold to, or deposited with, a third party;
  - (C) has been placed beyond the jurisdiction of the court;
  - (D) has been substantially diminished in value; or
  - (E) has been commingled with other property which cannot be divided without difficulty.

(2) **SUBSTITUTE PROPERTY** in any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) **RETURN OF PROPERTY TO JURISDICTION** in the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) **RESTITUTION FOR CLEANUP OF CLANDESTINE LABORATORY SITES** The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

- (1) order restitution as provided in sections 3612 and 3664 of title 18;
- (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and
- (3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.

may legally execute the cases (by prosecutors). This compensation has been utilized by American Courts until now. In 1999, the Supreme Court in Los Angeles decided that General Motor Company or GM had to compensate for 49,000 million dollars for the family of a black woman who was severely injured in a fire. This is because the car of the mentioned company that she bought was hit by other car. Consequently, she was in a fire severely injured her. The fuel tank of the car was too close to the front bumper. After the car was hit, it could explode easily. The company already knew that this design is dangerous, but it still manufactured this model of cars without modifying the model because it did want to increase the production costs.

The mentioned cases are good examples of the severe punishments for the juristic person committing crimes affected many people. These are different from those happening in Thailand. For examples, in the cases of car crashes causing fire that killed drivers or toxins released by factories and killed people, no one was responsible for the results as well as appropriate punishment or measure for the juristic person.

Therefore, it can discuss the results from punishments for the juristic person in the United States and France that;

For the United States, after the mentioned punishments (e.g. fine) given according to their objectives, American laws were enacted in 1984 and amended in 1987 in order to emphasize on the juristic persons' offenses. Normally, the amounts of fines for the juristic person is 2 times higher than those for individuals. In 1987, the fines were increased significantly in U.S. The results of punishments for the juristic person were accepted. If there are violations of punishments (e.g. violating conditions or probation), then the responsible persons will be fined or imprisoned according to courts' decisions. If punishments are severe, then probation or community services will be effective because the juristic person will face difficulties or limitations for conducting its businesses.

In summary, the criminal punishments for the juristic person in U.S. were combined with civil measures in order to help victims affected by the juristic persons' actions. The victims might be persuaded to sue the juristic person for some economic offences. The victims might be compensated for many times higher than the damage they received. As a result, both culprits and victims are stimulated to protect their own benefits and that of the society in order to effectively prevent offenses.

For the punishments of the juristic person under the Civil Law by considering French Punishments Applicable to Thailand can discuss that; This section is about the criminal punishments for the juristic person under the Civil Law in order to analyze relevant concepts and compare those under the Common Law. This is will demonstrate the differences between the punishments under the two systems. In this section, the relevant concepts of a country using the Civil Law will be analyzed. The country is France, which is the case study in this section.

Nevertheless, for considering the juristic persons' criminal liabilities. There are parties considering that the juristic person should not have the liabilities, under the Civil Law. This is because the objectives of criminal punishments are to controlling culprits with criminal minds. Thus, the punishments for the juristic person does not comply with their objectives because the juristic person do not have minds as individuals and some punishments are not applicable to the juristic person. Reasons for criminally punishing the juristic person have to be considered in order to prevent offenses that can affect the society. Hence, it can be concluded under Civil Law, the juristic person does not have criminal liabilities. Nonetheless, the juristic person had the liabilities under some special laws; for instance, Corporation Law (Act No. 1459, as amended) or Service Law that state the liabilities and punishments. That is, the juristic person could only be punished by fine or forfeiture. Afterwards, the punishments for the juristic person were amended. The country that uses the punishments appropriately and efficiently is France, which is studied below;

Firstly, problems and development of the punishments for the juristic person. The juristic persons' criminal liabilities are clearly stated law such as criminal law because it is needed that the juristic person must be punished according to the objectives of the punishments. Put differently, the juristic person must conduct its businesses carefully and provide benefits for the society.

Moreover, this is to solve a problem that the juristic person and groups of individuals who do not oppose the juristic person with the criminal liabilities. There is no appropriate measure and arguments about the punishments. For example, fine may not lead to fairness for the juristic person and individuals. In other words, the amounts of fines for the juristic persons and individuals must be equal. Individuals can be imprisoned, but the juristic person can only be fined, reprieved or punished. These may lead to inequality between the juristic person and individuals in some cases. If the juristic person take illegal actions, then the effects of the actions are usually adverse than those of the individuals. However, the juristic person has privileges by only being punished by fine or forfeiture. On the other hands, if the individuals take illegal actions, then they may be imprisoned. With these problems, France enacted the special laws that enable the juristic persons' criminal liabilities. The punishments for the juristic person must be appropriate for their statuses as clearly stated in French Criminal Code.

This Code was used in 1994. It was a significant amendment of the previous one that had been used by Napoleon for over 100 years because the old one was quite obsolete. The new one had been drafted and improved for 2 years before it is used. This Code specifically states the juristic persons' criminal liabilities. The criminal punishments for the juristic person is stated in Zone 1 of Type 1 of Article 131. For example, the juristic person is fined if it commits general offenses. The amounts of fines are 4 or 5 times higher than those for individuals. However, this code states the capital and light punishments (under Articles 131 - 137) and other light punishments for the juristic person (under Articles 131-140 of the newly amended code) that will be

discussed later. Nevertheless, the code newly amended in 1992 clearly states the criminal liabilities and punishments for the juristic person. This concerns the appropriate punishments for the juristic person and lead to fairness between the juristic person and individuals who are culprits.

By considering the punishments in France that can be applied to Thailand, it can be stated that the French criminal punishments are effective and can be divided into 2 types.

The first type is Capital and Light punishments

(1) Fine - the highest amount of fine for the juristic person is 5 times higher than that for individuals (Articles 131 - 138).

(2) Special punishments for the juristic person - these punishments can be equivalent to the punishments for individuals stated in Article 131 -135 as summarized below.

Dissolution - this punishment is for the juristic person that commits serious offenses. This punishment can be compared as the imprisonment for longer than 5 years for individuals. This punishment is effective for the juristic person that has conducted businesses for a long time and committed serious offenses affecting the public. This can be compared to the capital punishment.

Prohibition to conduct businesses or cancellation of licenses (interdiction d'exercer une activite`)- this kind of punishment is no longer than five years. The period of the punishment is dependent on the objectives of courts. The prohibition is similar to the imprisonment for individuals because it can affect the juristic persons' rights and liberties.

Probation under court officers (placement sous surveillance judiciaier)- this punishment takes away the juristic persons' freedom for conducting its businesses

for not longer than five years. To conduct the businesses, the juristic person must be allowed by courts and may be monitored. Consequently, it does not have freedom to conduct its businesses.

Cessation of operation (*fermeture*) – the businesses of the juristic person causing problems are ceased without definite periods. This measure is different from the dissolution, if the juristic persons' factories or branches create environmental problems, then the factories or branches will be closed down. However, the headquarters of the juristic person can continue its operations.

Exclusion from public auctions (*exclusion des marches publics*) – this punishment does not have a definite period. The longest possible period is five years. Normally, the juristic person is established in order to make profits and trusted to join public auctions. If it is prohibited to conduct its businesses or join public auctions, then its incomes are cut off. As a result, it has to be carefully conduct its businesses.

Prohibition to raise funds from the public (*interdiction de faire appel public à l'épargne*) – the longest period of this punishment is five years. However, it may not have a definite period. This also prohibits the juristic person to raise funds from the public either by making loans from the financial institutions or the public. This is difficult for the juristic person to conduct and expand its businesses. This measure significantly affects the juristic person because its businesses need credits in order to circulate its funds as can be normally seen in current economic situations.

Prohibition to issue cheque or use credit cards (*interdiction d'émettre des chèques*) - the longest period of this punishment is five years. This does not include cheque for withdrawing money. This measure creates difficulty for the juristic person.

Confiscation – this measure is a criminal punishment for the juristic person that fines cannot be applied to. The juristic persons' properties that are or will be used for taking illegal actions and those from the actions are confiscated.

Announcement or publication of decisions – this is to announced that the juristic person is the one committing offenses in order to discredit the juristic person thought newspaper, radio or other media and inform people to acknowledge and protect themselves from the juristic person.

Secondly, Light punishments under Articles 131 -140 are as follows.

Fine – the highest amount of fine is 5 times of that for individuals who are culprits (Articles 131 - 140).

Limitation of rights under Articles 131 to 142 – this punishment is the light punishment in Level 5. Courts may limit the juristic persons' rights to issue cheque for not longer than one year. This excepts for issuing cheque for withdrawing money, using credit cards or forfeiting properties as stated in the capital punishment in level 9. Furthermore, courts can punish the juristic person under Articles 131 -143 and use their discretions under Articles 131 - 144.

In summary, the criminal punishments for the juristic person in France, which use the Civil Law, do not state the juristic persons' criminal liabilities, except for special law stating the liabilities and punishments for the juristic person. Measures and punishments for the juristic person is different from those for individuals. The French Civil Code, which is currently used, it states the punishments for the juristic person committing offenses.

In addition, consequences of the punishments for the juristic person in France can be analyzed that; the punishments for the juristic person in France is effective and meet the punishments' objectives. In other words, the juristic person

carefully conducts its businesses that directly affect the other people or the public since the punishments directly affect the juristic person, not its representatives.

Therefore, the juristic person and its members has difficulties in taking any actions and it is aware of the consequences of the punishments that affect its freedoms, properties and reputations valuable for the juristic person. This is similar to the punishments for individuals that can meet the objectives of the punishments and are effective for the changing society. Hence, the punishments for the juristic person in France meet their objectives to punish the juristic person appropriately and effectively as well as minimize crimes caused by the juristic person. As a result, the juristic person is fairly punished according to the objectives and legal principles under the Civil Law without causing confusion.

It can be concluded that regarding the criminal liabilities and punishments for the juristic person in foreign counties (e.g. U.S.) using the Common Law by basing on the concepts used in U.K. and those counties (e.g. France) using the Civil Law, it is found that both legal systems face a problem of deciding whether the juristic person has criminal liabilities or not as many arguments were made. Afterwards, the 2 legal systems could solve the problem by considering that criminal policies should be used. Since, the economic situations are changing and many businesses are conducted in the form of the juristic person, the number of offenses commit by the juristic person is increasing.

Thus, the 2 legal systems accept the juristic persons' criminal liabilities by following the principle of suppressing crimes and reducing damages caused by the juristic person. Many obsolete laws were amended such as the Criminal Code. That is, the laws regarding the juristic persons' criminal liabilities are amended and more appropriate. For example, new punishments are added or other measures are combined with criminal punishments. That is, the juristic person causing damage on others are probate and have to restore the damaged properties under the control of the

government's officers. The juristic person may have to provide community services as effectively used in U.S. in order to provide opportunities to the juristic person to do so.

France, which is under Civil Law, applies legal principles to solve the problem by accepting that the juristic person can have criminal liabilities and amending the Criminal Code, which had been used for a long time.

The reason that Thailand should apply English law and French law to legal entities because the background of the problem of liability for criminal offences of legal entities in Thai law began in 1912 which was the year that "Partnership and Company Act of 1912" which was the first law that accepted "legal personality." The establishment of legal entities in Thailand started in the period of King Rama V that His Majesty provided his royal permission to establish the companies such as Siam Lands, Canal and Irrigation Company which was registered as a private company in 1888 by the partnership of noblemen and western businessmen included Pra Ong Jao Sai Sanitwong Prananapitpasi or Chuen Booknak, Joachim Grassi, and Yom Pisalayabutra or Cheif Sathornrachayut. Later in 1892, there was a change of the shares ,Erwin Muller, Hans Metzler, and MR. (the great grandchild of the king) Suwaphan Sanitwong, the first son of Pra Ong Jao Sai Sanitwong, had become the new partnership. At the same time, they accepted the concept of "liability for criminal offences of the legal entities" in Thailand and according to the Act, the penalty for the legal entities was defined in "group of punishment" as well.

Later on, there was a declaration to enforce the Civil and Commercial Code part 3 during the period of the Phra Mongkut Klao Chao Yu Hua or King Rama VI and the "Partnership and Company Act of 1912" was cancelled and legislated in the characteristics of such partnership. Regarding to the chapter of offences for the legal entities that is apart from of criterions for the legal entity's operation. There was the determination of liability for criminal offences of the legal entities stated in "the Penal Code of Siam R.S. 127" to replace the cancellation of the "Partnership and Company Act of 1912" which contained "group of punishment".

Furthermore, the new legal entity's offences were legislated according to "the Additional Act of Penal Code of Siam 1925" by adding to "Part 11: the offences concerned partnership, company, association, and foundation" which later had changed to "the Act of offence determination concerning registered partnership, limited partnership, limited company, association and foundation of 1956." When there was the preparation of the current Criminal Code, which is the most important connection because there has been a serious discussion about the issue of liability for criminal offences of the legal entities, to be clearer, in the preparation of the current Criminal Code, the legislation of "Part 11: the offences concerned partnership, company, association, and foundation" of the "Penal Code of Siam R.S. 127" was deleted from the Criminal code.

Moreover, during the preparation to announce the Criminal Code, "the act of offences concerning registered partnership, limited partnership, limited company, association, and foundation of the year..." was drafted and enforced at the same time with the Criminal Code. The reason of declaration using this act is interesting as it stated that "the offences relating to registered partnership, limited partnership, limited company, association, and foundation which are a part of the Penal Code of Siam R.S. 127 will be cancelled and the new penal code does not contain the legislation concerned such topic. Nevertheless, according to the law in other countries, offences concerned to registered partnership, limited partnership, limited company, association, and foundation have not been mentioned in the Criminal Code, therefore; it is ample to legislate such offences as a separate act."

During the preparation of the act for offence determination. There has been an effort to legislate the legal entities to be liable for criminal offences in general as can be seen from the first group in general chapter, Section 3 which stated that "Section 3 registered partnership, limited partnership, limited company, association, and foundation usually are liable for all criminal offences including offences mentioned in this act or in other laws, except for the offence that only natural person can be liable for. For punishment that will be used with such person, in case that the offence is subjected to imprisonment or death penalty, such punishment shall be

changed to the fine for not more than 50,000 Baht and for security methods that will be applied to such the legal entity shall be bond with security or prohibition of operating curtain business.” But, when the house of representatives received the draft of law, the commissioners have deleted the passage in the Section 3 which Professor Dr. Yud Sang-uthai who was one of the commissioners during that time, it provided the reason that “the commissioners deleted all passage in the first group because after consideration everyone agreed that it is not related to offences of part 11 of the original penal code that will be cancelled is the placement of the general principle of registered partnership, partnership or limited company and this legislation shall not be legislated again and should be in the draft of Criminal Code.

However, there is no such legislation in the draft of Criminal Code because the commissioners do not agree to write a fixed liability of limited partnership and limited company. So, it depends on each law to interpret its meaning if the house of representatives aim to have companies liable for offences or not. For example, there has been judgment from the Supreme Court stated that the company which owns the newspaper shall be liable for criminal offence of libel and slander. Therefore, the commissioners agreed that the house of representatives should issue a law case by case or otherwise this issue should be interpreted by the court.

Hence, registered partnership, limited partnership, or limited company should be liable for criminal offences. In addition, writing in the act which only aims to prosecute the partnership according to the Civil Law is not correct and it is too fixed to do so. Thus, the commissioners have deleted such passage.”

From the above passage, it is reason that many supports idea that the legislative court did not want the legal entities to be liable for criminal offences which is the same as the legislation stated in the Criminal Code. In case the legislative court wishes the legal entities to be liable for criminal offences. So, the legislation will be legislated in each act separately. However, the consideration of the scope of liability for criminal offences of the legal entities in Thailand according to the consideration approach of Thai Court can divide the law that defines related to the offences into 3 types including;

Firstly, the law clearly defines the liability for criminal offence of the legal entities: in this case the law usually defines the legal entities to operate or give up certain practices and if the legal entities do not follow or breach the laws, then they will be guilty. This can be seen from the legislation of law that clearly mentioned, if the legal entities are the offender then they shall be liable for such offences and shall be punished by law. Examples of this type of law are various such as Credit Information Business Act, B.E.2545 (2002) which clearly legislated the liability for criminal offences of the legal entities in Section 42 as follow, “Section 42, any credit information company does not follow Section 7 Section 8 or Section 16 shall be punished for a fine of not more than 300,000 Baht and the amount of not more than 10,000 Baht per day throughout the period of violation or until such offence is treated properly”, the Management of Partnership Stakes and Shares of Ministers Act, B.E. 2543 (2000) which vividly legislated the liability for criminal offences of the legal entities in Section 16 as follow; “Section 16, any legal entities do not follow Section 10 or Section 13 paragraph 1 shall be punished with a fine of not more than 300,000 Baht”, the Limited Companies Act, B.E. 2535 (1992) which legislated the liability for criminal offences of the legal entities very clearly in Section 200 as “Section 200, any company that does not follow Section 61, Section 62 paragraph 1, or Section 96 paragraph 1 shall be punished with a fine of not more than 50,000 Baht”, Securities and Exchanges Act, B.E. 2535 (1992) in class of punishment. There are sections that define offences of the legal entities such as Section 273 stated that “Any company that breaches or does not follow the criterion or defined methods of Section 50, Section 53, Section 191, Section 192, or Section 193 shall be punished with a fine not more than 100,000 Baht and shall be fined not more than 3,000 Baht per day throughout the violation time”, and Section 294 stated that “Any securities companies agreed to join with each other in order to support securities business that are not for the purpose of making profit or share income without establishing an securities business association, which according to this act, the offenders shall be punished with a fine not more than 500,000 Baht and shall be fined not more than 10,000 Baht per day during the violation time”, Life Insurance Act, B.E. 2535 (1992) Section 90 stated that “Any company that does not check shareholder registration or does not inform of shareholder registration which is considered as breaking the rule of Section 12 and shall be punished with a fine starting from 10,000

Baht to 50,000 Baht. In case that it was continuously action, then the offender shall be fined 5,000 Baht per day throughout the violation time”, and Section 95 legislated that “Any company issued an insurance policies or attached document of the insurance policy that are against Section 29 or designed the interest rate that is against Section 30 or do not follow Section 31 or Section 32, shall be punished with a fine not more than 100,000 Baht.”

Secondly, for offences that the law has defined implicitly the liability for criminal offences of the legal entities which are not the case that the law has legislated clearly, the legal entities can sue to liable for offences as the first case but it is the case that the law has legislated a person who takes responsibility and has certain status to be liable. The example of this type of law included the Multimodal Transport Act, B.E. 2548 (2005) which legislated liability for criminal offences in Section 71 as follows; “Section 71, any registered the multimodal transport entrepreneur that does not follow Section 43 or Section 47 paragraph 2 or breaches the order shall be prohibited from the operation according to Section 57 paragraph 2 and shall be sued for punishment with a fine starting from 50,000 Baht to 500,000 Baht and additional fine of 3,000 Baht per day throughout the violation time”, Telecommunication Business Act, B.E. 2544 (2001) which legislated the liability for criminal offences in Section 68 as follows; Section 68, any license holders expand their businesses without a permission according to Section 14 shall be punished with the imprisonment of not more than 3 years or shall be fined not more than 600,000 Baht or both”, Thailand Fuel Trade Act, B.E. 2543 (2000) which legislated the liability for criminal offences of Section 36 as follows; “Section 36, fuel traders according to Section 7 that do not follow the condition defined by the ministers according to Section 8 shall be punished with the imprisonment for not more than 6 months or shall be fined not more than 50,000 Baht or both”, the Mass Rapid Transit Authority of Thailand Act, B.E. 2543 (2000) legislated the liability for criminal offences in Section 78 as follows; “Section 78, any concessionary who does not follow Section 54 or Section 55 shall be punished with the imprisonment not more than 3 months or shall be fined not more than 60,000 Baht or both”, Medical Device Act, B.E. 2531(1988) which liability for criminal offences was legislated that “Section 64, any licensees that do not follow Section 23 paragraph 1 or Section 29 shall

be punished with a fine not more than 5,000 Baht.” Furthermore, in some cases, the law may define a specific responsible person to be liable for others’ actions which the legal entities shall be responsible for, such as the Notebook, Document, and Newspaper Act of 1927 which defined offences of newspaper owners.

In addition, there was a case that the legal entities might be liable as the cause or employer such as the Measurement Act of 1923 (which already cancelled), Firearms, Ammunition, Explosives, Fireworks, and Equivalent of Firearms Act, B.E. 2490 (1947), and the Animal Food Quality Control Act, B.E. 2505 (1963), etc. Examples in Social Security Act, B.E. 2533 (1990) in the sixth class, there are section that defined offences of persons who have certain status specifically such as “Section 96, any employer, who intentionally, did not submit the form to the internal office within the assigned time according to Section 34 or did not provide a written inform to the office about changes or additional revision within the designed time according to Section 44 shall be punished with the imprisonment not more than 6 months or shall be fined not more than 20,000 Baht or both”. In summary, the legal entities are able to be liable for criminal offences as the cause or employer or have a certain status as specified by laws, which means the legal entities can be liable for criminal offences and can be punished even though there is no defined directly.

Moreover, Thailand also has the law but it has not defined the liability for criminal offences of the legal entities which this type of liability is different from the 2 types mentioned earlier. That is, the case which the law has not defined the punishment for the legal entities directly and it has not defined specific statuses which is the topic needs to be considered in details in order to clarify the word “anyone” as mentioned in the Criminal Code and Acts will include the legal entities or not. The examples of this type of law included, Compact disc production Act, B.E.2548 (2005) which criminal liability legislation in Section 23 stated that Section 23, anyone who does not follow Section 5 paragraph 2 shall be punished with a fine not more than 200,000 Baht”, Thai Traditional Intellectual Medicine Protection and Support Act of 2009 legislated criminal liability in Section 79 as follows; “Section 79, anyone who breaches Section 51 shall be punished with the imprisonment not more than 6 months

or shall be fined not more than 10,000 Baht or both”, the Hotel Act of 2004 which legislated the criminal liability in Section 59 as follows; “Section 59, anyone who breaches Section 15 paragraph 1 shall be punished with the imprisonment not more than 1 year or shall be fined not more than 20,000 Baht or both and not more than 10,000 Baht per day during the violation time”, Offences Concerned the Quotations Presented to Government Offices Act of 1999 which legislated the criminal liability in Section 4 as follows; “Section 4, anyone who agrees to quote the price for the purpose of proving benefits to someone to have the privilege to sign a contract with the government office by avoiding a fair competition or obstructing the others from offering products or services to government office or by taking advantages from government office which is not normal business operation shall be punished with the imprisonment starting from 1 to 3 years and shall be fined with 50% of the highest amount quoted between those who committed such offence or of the amount that was agreed in the contract, depending on the amount is the highest”, Emergency Decree on obtaining Loans Amounting to Public Cheating and Fraud, B.E. 2527 (1984) which legislated the criminal liability in Section 12 as follows; “Section 12, anyone who committed offences according to Section 4 or Section 5 shall be punished with the imprisonment starting from 5 to 10 years and shall be fined starting from 50,000 Baht to 1,000,000 Baht and not more than 10,000 Baht per day throughout the violation time.” According to the consideration approach of Thai Court, the legal entities may be liable for criminal offences as the court interpreted the word “anyone” as the legal entities as well, for example; the offence of copying a trademark, forging a trademark, forging document, breaking the officials order and embezzling people according the Criminal Code as well as any acts such as the Control of Trading and Business Affecting Public Safety and Peace Act of 1928, Custom Act, B.E. 2469 (1926), as well as there had been the determination of having the legal entities to be liable according to the Act of using cheques in 2497 (1954), etc.

However, the judgment for criminal offences of the legal entities in Thailand has not been accepted by many lawyers which the problem about the liability for criminal offences of the legal entities in Thailand has been divided into 2 parts, including the part that people agreed on the concept that the legal entities can be liable

for criminal offences by providing a reason of the legal entity's intention through the representatives which is the consideration that analyzed from the legislation of the Civil and Commercial Code in Section 70 paragraph 2 as the main approach of the liability consideration for criminal offences of the legal entities. That is, if considering the legislation in Section 70 paragraph 2 as legislated that "the purpose of the legal entities usually expressed through the legal entity's representatives". Therefore, the legal entities can act and be liable for criminal offences from such action as well. The explanation regarding to the concept that the legal entities shall be liable for criminal offences as follows;

- 1) When, there is the law legislated directly for the legal entities to be liable.
- 2) When, there is the law appointing the legal entities to be liable for others' actions which the legal entities shall be responsible such as according to the Notebook, Document, and Newspaper Act of 1927 or the Mining (Amendment) Act of 1918.
- 3) Even though, there is no defined law, but the legal entities may be liable for offence if it was the operation according to the legal entity's objective and such the legal entity obtained benefits from such operation. In addition, Professor Banyat Suchewa commented that if it is the offence that requires or does not require intention, the legal entities can be liable for criminal offences as mentioned in no 3. Regarding to, the offences that the legal entities may not be liable as follows; offences done by negligence "the negligence of the legal entity's representative cannot be considered as the purpose of the legal entity because the negligent's action is not the action done with intention." In addition, the legal entities may not be liable for offences that the punishment does not allow to punish them. So, "any offences that are subjected for death penalty, imprisonment, or only imprisonment cannot sue the legal entity to be liable for" because it is the punishment that cannot be forced with the legal entities. The legal entities may not be liable for the offence that can only be done by the natural person such as conviction of larceny or making a fault statement because they are against the condition of the legal entities.

Furthermore, many lawyers in Thailand also commented that the legal entities may be liable for criminal offences with the same reason that Professor Banyat Suchewa has given; any offences that were done by intention, the legal entity's purpose usually expressed through the legal entity's representative and the legal entities are able to act and be responsible for such action as well. In addition, in the aspect of the objective of punishment, the punishment for the legal entities will "prevent the legal entities from seeking for illegal and corrupted benefits." Concerning a problem about the punishment that will be used with the legal entities, the legal entities can be punished as much as the condition of offence will allow or "order to close the business or withdraw the legal entity".

On the contrary, there are various lawyers think that the legal entities cannot be liable for criminal offences due to the difference of the principle of criminal liability and civil liability. Criminal offences should only have completed the external factors but also the internal factors, which is the intention that is called differently in other countries such as in Germany, the offender shall have the knowledge of right and wrong or in England, the offender should have a bad intention, etc. Professor Henry Lorang, the French teacher at the law school, Ministry of Justice commented on the problem that "who will be called as an offender, should remember that the criminal punishment is not because the damage has occurred and the person violates the law with the corrupted intention. Therefore, things and animals cannot be an offender, a natural person may be an offender. For a person that the law has made up will be a criminal offender or not is still a problem.

However, it can be answered that once there is a law violation, there should be persons who are related to the made up person and they can be managers, directors, every shareholders or some of shareholders are the violator as these persons feel and intended to do such action, therefore there shall be a punishment. But, there are 2 exceptions for the punishment of the legal entities which are; when the law specially legislated to punish the legal entities such as the Company Partnership Act Section 281 and when the violation is the light punished offence such as the law stated in the Penal Code of Siam Section 36 which the most people think that the legal entities

can be punished.” Besides, many lawyers mentioned about the problem of criminal liability of the legal entities in the attached note of the judgment no. 1144/2493 which explained about the discussion of criminal liability of the legal entities as well as the law relating to such problem in other countries.

For the problem of the scope of criminal liability of the legal entities, the explanation stated that “...legal entities are the thing that the Civil Law has created only for the asset benefits, if the criminal law wishes to punish the legal entities, there should be clearly indicated as the Penal Code of Siam that will vividly to punish the company. In case that the Criminal Law did not legislate specifically and then it shall be considered that there is no legal entity...the difficulty of case consideration is the judges usually mix up between the concept of Civil Law and Criminal Law. In term of a crime, Section 43 clearly legislated that criminal actions are done with intention and only a natural person will intend to do and wish for the result or intend to do and may see the result of such action. The Criminal Law is rooted on the truth and will only prosecute whenever the offender has a bad intention or negligence and the legal entities usually do not have intention”.

Likewise, Professor Jitti Tingsapat mentioned about the necessity that cannot be avoided which in some cases of the legal entities should be liable for criminal offences and for the scope of liability that he explained “...another interesting problem that does not have directly argument or consideration what is the degree that the legal entities commit offences until they can be punished for a fine but not imprisonment by condition. Another problem is how can the legal entities commit offences when they are not a person and do not have heart or soul. How can they have actions with intentions which are the important matter of the criminal liability.

The Civil Code Section 70 also legislated that the purpose of the legal entities is expressed by their representatives. This is the civil law and it should mean the expression of intention in terms of civil law not criminal law. According to Section 76, it is clearly legislated that the representative’s actions may result in paying for compensation and not relating to criminal punishment. Therefore, if any criminal offences require the intention as the criterion as per the Criminal Code Section 59 or

according to the Penal Code Section 43. Then, there is usually no way to punish the legal entities who do not have heart or soul and they cannot act in an illegal way because they neither do not feel the action nor wish for benefits or see benefits.

However, except for some cases that the law has legislated specially such as offences occurred because of the advertisements appeared in publications according to the petition to the Supreme Court No. 265/2473 or the offences that are legislated to the offender such as a concession holder according to the Mining Act of 1918, the petition to the Supreme Court No. 841-842/2491 and 185/2489 which seem to be the offence, even though it occurred with no intention and a person who is the holder required by law shall be liable for the offences...”

Moreover, the professor also explained about the scope of the liability for criminal offences of the legal entities in the book titled, the explanation of the Criminal Code episode 1 part 1 that “ in Thai law, apart from what legislated in the Criminal Procedure Code Section 7, the Criminal Code does not legislate that the legal entities shall be, to what degree and the liable for criminal offences besides some acts that appointed to punish the legal entities directly such as the Offences of Registered Partnership, Limited Partnership, Limited Company, and Foundation Determination Act of 1956 and if there is no law specially legislated, it is not yet known how far the court would undertake this issue...as there is no direct law for this issue, if the court will punish legal entities apart from the legislated offences or offences with no intention or offences that the legal entities shall be punished on behalf of the others may be an advance interpretation far beyond the law”.

In addition, Mr. Wiroch Barirakjanyawatra explained the problem of the scope of liability for criminal offences of the legal entities that “...Thai Criminal Code is the same French Criminal Code as they did not legislate the criminal liability of legal entities directly. The problem is that shall the legal entities be liable or not and to what degree. In other words, the word “anyone” in our Criminal Code or any acts refers to the legal entities or not? This is the same as the French law; the legal entities may not commit or be responsible for the criminal punishment except there is the case that the law is clearly or implicitly legislated which the legal entities shall be liable for such

criminal offence. The law appears to be like this because some lawyers agreed that the legal entities are just an abstract, they do not have bodies and soul, therefore they cannot act or intend to do something prohibited by law...”.

In summary, the point of views of both parties concerning the scope of the liability for criminal offences of the legal entities are the same that the legal entities shall not be liable for criminal offence in general according to the Criminal Code but they shall be liable for criminal offences whenever there are law legislated specially for the legal entities. However, the opinions from both parties are relevant according to the reason that as legal entities are not a person and they do not have heart or soul. Then they cannot have intention or bad intention as the main factor of the criminal liability structure. This is relevant to the Fiction Theory which confirms that the legal entities are just an imposed person that are not a real person and this is conflicted with the Realistic Theory that argues the legal entities are a real person.

Considering the aspect of the consideration of Thai Civil Court, it revealed that in Thailand even we categorize types of laws and see the differences of each type of law clearly such as the punishment of the legal entities judged by the court based on the law defined directly or implicitly such as the judgment no. 480/2524 which was judged that the plaintiff sued the first defendant that is the owner and the second defendant which is the directors who have authority and had released the waste water into the river which is a breach to the Minister of Ministry of Industrial's Announcement, and required to punish according to the Factory Act of 1969, Section 39 and Section 50. After the defendants have confessed, then the defendants shall be punished as required by the plaintiff. Although the plaintiff had indicated Section 50 bis, but the decision approach of Thai Court is a problem in the aspect of the juristic method. The most is criminal liability of the legal entities according to the 3 types of law which is the law did not indicate the criminal liability of the legal entities directly, and legislated a person that is wished to be a responsible person as “anyone” which Thai Court did not categorize so as mentioned above. For example; the judgment no. 3488/2528 which decided that the court may punish the legal entities for the offence of providing a fault statement according to the Criminal Code Section 175 which the

punishment contains both imprisonment and fine, by punish with a fine only. The decision approach of Thai Court divided by types of offences with intentions and offences caused by negligences for the analysis are as follows;

First aspect, is the liability for offences with intention: For the decision principle of Thai Court to punish the legal entities for the 3 types of offences, the civil court has judged the criminal liability of the legal entities according to the criterion of the Criminal Code by considering “the factors of offence” which consist of external factor (offender, action, and object used in action) and internal factor (intention and special intention) and for the benefit of the consideration of Thai court’s decision. The consideration of decision for the 3 types of offence are divided as follows;

1) The offence related to the offender: Although, there is no law directly defined or the offender is not appointed with a certain status according to the first and the second type of offences, the civil court can also judge the legal entities to be liable for the third type of offence;

1.1) The legal entities may be an “offender” for the offence to be committed by intention, the court consider that if it is the action committed by the legal entity’s representatives, then the intention is bounded with the legal entity and should be considered as the legal entity’s intention. Therefore, the legal entity is a person who committed the offence with intention. In addition, according to the decision method of Thai Court, the legal entities may be an offender or the cause of the offence that requires the special intention such as the judgment for the liability for the offence of people defrauds which requires the corrupted intention. For example, the judgment no. 97/2518 which decided that the company’s management promoted and deceived to sell lands to people, although the subscribers did not pay the payment and there was only buyer who reported the case, it is the offence according to Section 343, So, the limited company is also guilty according to this section which the court decided to fine the company and imprison the manager.

1.2) The legal entities may be an “offender” for the offences that to be committed without any intention if that action is the legal entity’s representative actions

which is committed as a duty within the scope of objectives of the legal entity and the legal entity obtains benefits from that action. Therefore, the legal entity shall be liable for criminal offences for that action. In conclusion, according to the decision of Thai Court, the legal entities may be an offender for the third type of offences as same as the first and the second types.

2) Offences relating to actions: If the legal entities may be an “offender” for the 3 types of offences as mentioned above. But, due to the condition that the legal entities are not a person and cannot move. Therefore, there is a problem which action from whom in which situation is considered as the legal entity’s action. According to Thai Criminal Code, there is no legislation if the action of legal entity’s representative is also the legal entity’s action.

However, the decision method of Thai Court, the legal entities shall be only liable for criminal offences when the criminal offence was committed by “ the legal entity’s representatives” for the purpose of the operation according to the legal entity’s objectives and the legal entity already obtained benefits from that action. The civil court has decided in the judgment no. 1669/2506 as “...although the first defendant is a legal entity that cannot operate anything as a natural person, but if that action is according to the registered purpose and the legal entity already obtained the benefits from that action then the intention is included in such action”.

So, if the offence was not committed within the scope of the legal entity’s objectives, even though the offender was the legal entity’s representatives, but the legal entities shall not be liable for such offence. Then, the legal entity’s representatives shall be liable personally as mentioned in the judgment no. 1050/2504 that “...if the limited company does not have purpose to provide insurance but the manager acted in a way that is similar to providing insurance which is the offence according to the Trading Business Control Act. Hence, the limited company will not be guilty with the manager... ” In summary, the actions that are considered as the legal entity’s action should be the action committed within the scope of authority and it should be representatives that can express to the legal entity’s purposes such as the manager who is nominated by law and regulations or constitution such as managing

director or branch manager. As can be seen from the Civil and Commercial Code Section 70-72 that does not refer to employees or representatives that are nominated by managers or other representatives.

3) Offences relating to intention and special intention: For offences that do not require intention. When consider the representative's action is the legal entity's action, then there is usually no problem about the consideration of intention, only the action of legal entity's representative is enough. However, the problem is that intention from who should be considered as the legal entity's intention and according to the Thai Criminal Code, there is no legislation. Thai Court has applied the Civil and Commercial Code Section 70 to punish the legal entities for criminal offences as well.

In addition, the judgment that is the criterion of this issue is the judgment no. 787/2506 that has placed the criterion about actions and intentions of the legal entities for criminal offences; by judging that if the legal entity's representative expresses any intention within the scope of representative's authority in order to operate the business in accordance with the legal entity, the intention is bounded with the legal entity and shall be considered as the legal entity's intention.

So, the legal entities may have intention that are the factor of criminal offences and commit offences with intention. It appeared that in this case the legal entity and managers were sued to be liable for the offence of counterfeit and copy trademark. The problem occurred that shall the legal entity be liable for such offence? The court of the first instance and the court of appeal have judged that the legal entities cannot commit neither criminal offences and cannot corrupted intention, such offence can be committed by only a natural person. Therefore, the case is dismissed.

Yet in the civil court, by the resolution of the meeting, it has considered the problem according to the judgment no. 787/2506 as "...the intention of the legal entities are usually expressed through the legal entity's representatives according to the meaning of Civil and Commercial Code Section 75 (means Section 70 paragraph 2 of the new civil and commercial code-the author), when the legal entity's representative expresses any intention which is within the scope of authority for the purpose of

business operation of the legal entity, then that intention is bounded with the legal entity and shall be considered as the legal entity's intention. Therefore, the legal entity has intention which is the factor of criminal offences.

However, this should be considered according to the characteristic of the offence, the circumstances of action and authority of the legal entity together with the objective of the legal entity...when Mr. Boonpet (Partnership Manager) committed an action using his authority for selling drugs which is the objective of the defendant's partnership and for trading benefit of the defendant's partnership. So, it is considered as the defendant's partnership intention as well...the court considered and punished the legal entity too.”

The judgment no. 787/2506 is the judgment that is called “criterion” of Thai Court in which many judgments later applied in as a criterion of consideration as well and the criterion that considered as the expression of intention of the legal entity's representative as well as special intention. The court judged the legal entities to be liable for the offence of fraud which requires corrupt intention.

In summary, according to the decision method of Thai Court, the actions and intentions that are considered as the legal entity's action and intention should be qualified as follows; a natural person expressed the intention within the authority and duty. He or she has expressed intention for the purpose of operation according to legal entity's objective. However; it should consider from characteristic of each offence, the circumstances of action, and the authority of legal entity's representative as well as each legal entity's objective and the representative has committed for the benefits of the legal entity, and “legal entity's representative” according to the decision method of Thai Court only and “manager”, “managing director”, and “partnership manager” are the legal entity's representatives that their actions and intention are as committed by the legal entity itself.

Therefore, according to the decision method of Thai Court for these 3 types of offence as mentioned above, the legal entities shall be liable for the following criminal offences; the offence that the law has legislated to punish the legal entities

directly, and the offence that the law has legislated the responsible person with certain special status and even though there are no offences of the first and the second types, the legal entities may be liable for criminal offences if the legal entity's representatives committed the offence as their duties within a scope of the legal entity's objectives and the legal entity obtained benefits from that action.

Section aspect is offences caused by negligence: Considering the judgment no. 787/2506 which the civil court has punished the legal entities because of the intention, by using the criterion on intention expression in the Civil and Commercial Code Section 70 paragraph 2 as criminal intention. In addition, the civil court has judged to punish the legal entities even with the offence that requires special intention. As can be seen from the judgment no. 97/2518 that the court punished the company which is the legal entity for the offence of fraud which is the offence that requires corrupted intention.

Regarding to the offences that do not require intention, once considered the action of the legal entity's representative as the legal entity's action, then there should not be the problem whether that the legal entity is liable for criminal offence or not. Thus, only the action of the legal entity's representative is enough to judge whether that the legal entity is liable for criminal offences.

Resulting in the problem that according to, the decision method of the civil court of Thailand which allows the legal entities to be liable for criminal offences, the offence that to be committed with intention or without intention. If it is the offence caused by negligence, the legal entity shall be liable for criminal offence or not such as offence caused by negligence resulting in the other's serious injured according to Section 300 of the Criminal Code or the Offence of Corporate Manslaughter according to Section 291 of the Criminal Code, etc. criminal offences caused by negligence are offence with no intention but committed without carefulness, which offenders may use such carefulness but not enough.

Therefore, considering the judgment approaches of Thai Civil Court mentioned above are not the criterion to will be used to punish the legal entities for

negligent actions as those cases are the offences that the civil court decided to have legal entities be liable for criminal offences committed with intention. However, using the criterion in Section 70 paragraph 2 of the Civil and Commercial Code judging the expression of the legal entity's representative in a civil way as a criminal intention according to Section 59 of the Criminal Code. Furthermore, Professor Banyat Suchewa commented that "...the negligence of legal entity's representatives cannot be considered as the purpose of the legal entities because the actions caused by negligence are not actions committed for the purpose of benefits. So, it is not the purpose of the legal entities..."

Nevertheless, Thai Civil Court has judged in the judgment no. 3446/2537 to punish the legal entity for the Offence of Corporate Manslaughter which there are many interesting concepts from that case. Concerning this case, the plaintiff sued the limited company which is the first defendant and the managing director of the legal entity is the second defendant that they were guilty according to the Criminal Code Section 83,225,291 and 300. The first defendant is the limited company and its objective is to buy and sell gas cylinders, all gas equipment, chemical supplies, etc. The second defendant is the managing director who has the authority to manage work of the first defendant as well as control, order, and assign operational policy to the first defendant's employees. The essence of the prosecution was "starting from January 1, 1990 during the day time until September 24, 1990 after midnight, time and date cannot be clearly indicated, both defendants, by the second defendant as the representative of the first defendant and as a personal issue, had ordered the first defendant's employees to contain petroleum liquid (L.P.G) into the truck's cylinder registered no. 71-0415 Bangkok which was a double cylinder truck of the first defendant.

Moreover, the truck was not allowed or certified by the Public Works Department and Ministry of Industrial concerned the Standards of Industrial Products according to the Regulation Issued by the Ministry under the Announcement of the Revolutionary Council volume 28 (1971) no. 3: using the cylinder made for gas storage on land as the truck's gas cylinder and did not install a safety valve on the cylinder for preventing accident in case of excessive leaking gas and might result in danger. It was

duty for both defendants to check for accuracy of such regulation before containing the gas into the cylinder and this is the business that both defendants shall practice. Unfortunately, the negligence with no carefulness, both defendants did not control or take care which was a breach to the law that aims to protect people's safety.

This was a carelessness action which persons in such situation as these two defendants should have a carefulness that is both defendants are the gas seller which is the flammable object; they should concern about the people's safety and should follow laws and regulations strictly in order to protect people's life and their assets. But, both defendants used the truck that was not certified from the Public Works Department and use the gas cylinder that was built for gas storage on the land. Nevertheless, there was no safety valve on the cylinder. Later in September 24, 1990 after midnight, Mr. Sutun Phakkaelek that the employee of the two defendants, he drove the truck along Dindang-Bangna motorway and then turn on the Petchburi road to deliver gas to customer which is his duty. With the negligence and carelessness, he drove the truck down on the motorway with rapid speed and did not stop for a red light and then turn right to Petchburi Tudmai road which is the same time that cars from another side of the road start moving after the green light, resulting in Mr. Sutan drove unsteadily in order to avoid those cars and crashed, leaning on the side and scraped along the road. The two cylinders were hit on the road resulting in a broken metal strings and broken cylinders. The gas was leaking rapidly because there was no safety valve and spread widely on the road to people's houses as well as cars and motorbikes that were waiting at the traffic light. This event caused greatly the loss of life, many bad injuries, and damages on assets.

The situation happened in Bang Pongpang, Yannawa, Makkasan, Rajatevi, Bangkok related to each other, and shall punish according to the Announcement of the Revolutionary Council volume 28 dated on December 29, 1971 no. 3, 6, the Ministry Regulation (1981) Issued according to the Announcement of the Revolutionary Council volume 28 no. 13(3) ,(5), 35, 38, the Ministry Regulation volume 4 (1996) no. 51 (1988) no. 17, the Criminal Code Section 83, 225, 291 and 300.

However, the civil court has decided that...the gas truck of the first defendant was not certified or checked from the Public Works Department, two gas cylinders installed on the truck were the cylinder for installing on land and could not be installed in the truck. Moreover, flow control valve was not installed on the cylinders which was against the Ministry Regulation volume 4 (1986 no. 51) and volume 5 (1988 no. 17) according to the Announcement of the Revolutionary Council volume 28 (1971) on the topic of filling petroleum without causing danger to people's lives and assets. So, even though one of the causes in this case was from the negligence of Mr. Sutan, the first's defendant's employee, who crashed the gas container truck resulting in leaking gas, flame, and explosion which caused many deaths and serious injuries as well as great damage on assets.

Anyhow, it is obvious that the another reason of this accident was from the action of the first defendant as well, not only just the result of Mr. Sutan's negligent action as the two defendants claimed in the petition to the crown. This is because if the first defendant followed the Ministry Regulation and the Announcement of the Public Works Department about criterion, methods of gas cylinder and parts installation for transportation, the tragedy would not happen. Even though, this truck installed the gas cylinder before the Declaration of Ministry Regulation volume 4 (1986), but it clearly stated in the Ministry Regulation that the owner shall adjust and change in accordance with the announcement within 365 days since the application date in August 19, 1986. It occurred that the first defendant did not care to follow the regulation and still used that truck to transport gas and delivered to customers until the tragedy date which had been about 3 years. The action of the first defendant is negligent and the first defendant whose occupation is gas trading and transportation which is flammable and dangerous, it should be especially careful not to put people's lives and assets in danger like this.

So, the action of the first defendant is guilty and for the second defendant, he was not only the first defendant's managing director but also the co-founder as well as the main shareholder of the company, so only management and all authority were with the second defendant. Moreover, the second defendant was the owner of the truck, therefore he should know that such truck shall not be used for gas

transportation because it was neither certified nor checked from the Public Works Department. The second defendant, as the first defendant's managing director who had authority to order and manage within the company but he neglected to solve the problem of the truck in order to make it right according to the Ministry Regulation. Instead, he ordered to use that truck for gas transportation and leading to the bad accident. Thus, the second defendant is also guilty. The excuses that both defendants claimed in the petition to the crown did not match with the truth; the inferior court judged that both defendants are guilty. The civil court agreed, and the petition to the crown of both defendants is not accepted. The civil court provided the consideration regarding to the punishment that both defendants shall be punished according to the Criminal Code Section 291 which is the highest level of punishment. According to Section 90, the first defendant shall be fined 20,000 Baht and the second defendant shall be imprisoned for 2 years and with 20,000 Baht for fine. However, the imprisonment shall be put on hold for 3 years according to the Criminal Code Section 56. Nevertheless, after the court explained that the legal entities shall be liable for Corporate Manslaughter, there is still an interesting problem that by condition, can the legal entity act and commit a Corporate Manslaughter or not. Especially, in the comparison of the English Court judged that the legal entities may be liable for Corporate Manslaughter, regarding to the mind factors, the court has placed the concept that the person shall have Mens rea that is not just negligent but should be gross negligent as well.

Considering the aspect of criminal punishment of the legal entities according to Thai law that should be revised, it can be explained that the Criminal Code Section 18 has defined types of the punishment as 5 aspects including; death penalty, imprisonment, confinement, fine, and forfeiture of properties. If considering from the physical condition of the legal entities, that the penalty is usually enforced with the body not be able to use with the legal entities. In practical way, the methods that can only use as the punishment of the legal entities are a fine and a forfeiture of properties. The main reason that the Criminal Code can be only enforced with the legal entities in two ways because the punishment according to the Criminal Code was legislated in order to use with the natural persons as the main target. The punishment that Thai court

use with the legal entities may not be relevant to reality. However, when considering the categorization of laws into 3 types as mentioned above, the punishment that will be used with legal entities cannot meet with the punishment's objective that aims for a harmful result on criminal offenders such as the judgment no. 787/2506 that punished the legal entity according to the Criminal Code Section 274 but the court only punished with a fine which is the only way that the law can provide. The judgment no. 3446/2537 that punished the legal entities according to the Criminal Code Section 291, but the court could only punish with a fine even though the law stated both fine and imprisonment.

Therefore, the determination of the punishment that will be used with the legal entities by considering the punishment's objective in order to stop offences is the most important issue for our society these days. Although, there are many other measurements to support some laws but they are not the main criterion. The addition of punishment for criminal offences of the legal entities in the Criminal Code by aiming it to be a general criterion is a considerable and interesting topic that should be pushed to happen. So that, the Criminal Code can be a central law which is an important standard for the consideration of the various prosecutions which contains correct steps and it is relevant to the juristic method of the law system.

In the consideration of the basic concept of liability for criminal offences of the legal entities by comparing with criminal offences of the legal entities in the Common law country (England) and Civil law country (France). It can be seen that the development of liability for criminal offences of the legal entities in various countries during the past few years has been a big problem including Germany, France, Italy, and Spain, etc. Originally, these countries thought that the legal entities cannot be liable for criminal offences, later this concept has been slowly changed especially concerning the offences of the legal entities affecting the financial system, and so on.

Moreover, in the European Union, the people were concerned about the issues which included offences that the legal entities shall be liable for such as in the Convention on the Protection of the Environment through criminal law (4 November 1998) especially in Article 94 or even in the United States that people argued a lot about

the perimeter of liability for criminal offences of the legal entities. Anyhow, even the United Nations Organization also concerned about the punishment of the legal entities that cooperate to commit offences such as in the United Nations Convention against Transnational Organized Crime, Article 106 that clearly legislated about the liability for criminal offences of the legal entities.

Regarding to the development of liability for criminal offences of the legal entities in Thailand, the context in each chapter points out that, concerning Thai legal entities, there has been a development as the liability for criminal offences of the legal entities was increasingly legislated. However, without a general criterion that they should be liable in which criterion. Moreover, the punishment with the legislation that may make the legal entities be liable for criminal offences, contains both fine and imprisonment.

Although the liability for criminal offences of the legal entities was not defined by laws, but the punishment mentions about the case that the legal entity is judged and punished and the law appointed the legal entity's representative to be liable for offences as well, such as the Social Security Act of 1990. Concerning the development of liability for criminal offences of the legal entities in Thailand on the issue of the consideration of Thai Civil Court, the judgment has been developed and the punishment is being used widely which can be seen from the punishment of the legal entities for Corporate Manslaughter according to the Criminal Code Section 291 in the judgment no. 3446/2537.

Likewise, the analysis on the problem of the legal person's criminal liability in Thai law shall be analyzed both in the legislature and the law enforcement in order to propose the solution. However, the problem that shall be considered is the issue of criminal liability of the legal person. In Thai law, this issue was raised as a legal issue for the debate in consideration level for the present issue of "Draft Criminal Code" by having a proposal to constitute the general principle which is accurate according to the juristic method that the legal person shall be criminally liable as it is mentioned in the Criminal Code of the French Republic A.C. 1992. In this case, Thailand had considered the major issues before as follows: The first one is the general

principle that the legal person shall be committed into the criminal liability and the proposed draft is mentioned as “a juristic person may be punished for a criminal offence when, by reason of its nature, such a juristic person may commit the act, which constitutes the criminal offence, ... The intention of a juristic person may be expressed through its representatives”. Secondly, it is about the punishment for the legal person comparing to the punishment of the natural person. In this case, the punishment for the legal person was converted to a fine (in the higher rate). If the legal person shall be punished, but the nature of problem was considered as it was mentioned and if it was considered with the new legislation in term of the acts, and it was found that the issue on the criminal liability of the legal person in Thai Law in the section related to this legislation by considering from the classification of the law types. It shall be found that law of Thailand can be divided into 3 types which are 1)The law that determines the criminal liability of the legal person clearly; 2)The law that determines the criminal liability of the legal person implicitly; And 3) The law that does not determine the criminal liability of the legal person which can be explained as follows:

The law that determines the criminal liability of the legal person clearly. It is the law that imposes the criminal liability of the legal person clearly that the lawmakers had determined the form of criminal liability with the most obvious, which means 1) the lawmaker imposed clearly on the individual who has to commit the criminal liability that he or she is a legal person, and this is to determine criminal policy that the legal person has to commit the criminal liability. It can be seen that in case which the legal person has to commit the criminal liability, most of the cases are not common crimes, but they are the liabilities related to economy, business, public, and safety, etc. 2) The legislature has imposed a penalty by taking to actual nature of the legal person into the consideration that the nature of the criminal penalty according to the Criminal Code is only a fine that would be prejudicial and it is determined as the penalty for the legal person by determining fine as a punishment with quite the higher rate if comparing with the fine as punishment in general cases.

The law that determined the criminal liability of the legal person and it is the types that the legislature determined the form of criminal liability unclear, which means

1) The legislature have regulated that those who have to commit the criminal liability shall be determined only “status” of those who have to commit the criminal liability no matter this is a natural person or legal person as they have to take a punishment in this case as this is the criminal policy determination that both natural person and legal person shall commit the criminal liability, and it is as same as in this case that most of the criminal cases are not common crimes, but they are the criminal on economy, business, hygiene, safety, etc., as it is mentioned in the first category of the liability.

2) The legislature have determined a penalty without considering the actual nature of person who have to commit the criminal liability whether they are natural person or legal person and the penalty which is determined in this second type of law. It is determined as it is a penalty to a natural person only without considering the nature of the criminal penalty under the Criminal Code and it is only the fine that it would be prejudicial and it is determined as a penalty for the legal person. Moreover, the penalty has not been determined as high rate of fine when the legal person is the one who act in the case. For example, Criminal Code of the French Republic determined a fine penalty for the natural person shall be 5 times higher when it is applied for the legal person. For the imprisonment, it can be changed to other penalties which have direct prejudicial result towards the legal person by the law. Therefore, the court will punish the legal person in this case, the court shall only fine the legal person.

The law does not determine the criminal liability of the legal person is the law that does not directly determine the criminal liability of the legal person such as Trade Competition Act, B.E. 2542 (1999) which regulated the offense in Section 51 that “anyone who violates Section 25, Section 26, Section 27, Section 28, Section 29, or fail to comply with Section 39 shall be liable to imprisonment by not exceeding 3 years or shall be fined not more than 6 million baht or both imprisonment and fine. In the case that the offense is repeatedly done, the liable shall be multiplied” by

determining a person who should take responsibility as “anyone” which generally means natural person only. However, the court shall punish the legal person as well. In this third type of law, it is the form that the legislature determined as the form of unclear for the criminal liability, which means:

1) The legislature has regulated individuals who have to take responsibility on the criminal liability by only determining as “anyone” who has to take responsibility on the criminal liability, which means only the natural person. Therefore, the criminal policy in the case that the law intends to punish only on the natural person as if they want to punish only the legal person. They would determine according to the first type, or if they would like to take punishment on both natural person and legal person, they shall use the second type as it is said that the legal person cannot take responsibility on the nature which allows only the natural person to do it such as the liability by stealth or fault testify as it is contrast with the nature of the legal person.

2) The legislature has determined a penalty without considering the actual nature of a person who has to take responsibility on the criminal liability as the purpose is to punish only the natural person. The penalty is determined in the third type of law, and it is determined to punish only the natural person without considering how to punish the legal person. However, when the court will punish the legal person. In this case, the court is able to punish only a penalty that can take for the legal person. Sometimes, it is inconsistent with the severe offensive. For example, the judgment of the Supreme Court No. 3446/2537 judged the legal person that he had commit the guilty of negligence which caused the others to death under Section 291 of the Criminal Code, and the court judged the legal person to fine for 20,000 Baht as the penalty in Section 291 determined to imprison and fine. Therefore, the court judged to fine the legal person for 20,000 Baht as the court cannot judge to sentence the legal person; instead, the court fined the legal person even it was a severe offensive.

As a result, the punishments for the juristic person is clearly separated from those for individuals. Legal processes can meet the changing economic and social situations. Finally, the countries under the Civil and Common Laws Systematically

solved the problems about punishing the juristic person according to its own guidelines and legal principles. An important rule or principle behind the consideration is to meet the objectives of the punishments for the juristic person. This condition is based on personal action which is not concerned with the juristic person. The juristic person's representative or the authorized person shall not be protected by law. This manner is in term of the Primary liability which is not the juristic person's representative or the authorized person's performance on duty. It is noted that the juristic person's liability may be considered by fault when it is proven that the juristic person take parts in term of Contributory liability in direct or supportive ways. Without a ground of Contributory liability, it is the juristic person's representative or the authorized person's liability alone.

The principle determination on the criminal liability of the legal person clearly can be considered from the concept of the juristic method in the Civil Law and Common Law Systems whether both laws have the different juristic methods or not even the law is applied and there are the same or similar results as the solution from these two systems are different, especially that organization has duty to constitute or provide principle of law. It means that in Common Law System, the court can place the principle by judgment even there is no law regulated, even it is the criminal offense which is called Judge-made- law.

Thus, in the Common Law System, the court judged to punish the legal person on criminal liability not matter what type of offenses, and even it is the offense which needs the internal element or Mens rea, Intention, or Gross negligence without restriction, and in practice, the legislature usually apply the principle that the court used to judge in type of common law offense, and then regulated in the law in the written consent as statutory offence, but if comparing with Civil Law System in case of France related to criminal liability of the legal person, it can be seen that in Civil Law System, the penalty on the legal person shall be according to the strictly principle for "No crime nor punishment without law". It can be seen that before the principle of criminal liability of the legal person is regulated clearly in Criminal Code A.C. 1992, the High Court of France only punished the case that the law regulated to punish the legal person

directly or implicitly in special case. Before, the announcement of application of Criminal Code A.C 1992 which was valid on March 1, 1992, the High Court of France never judged to punish the legal person in any offenses under the Criminal Code. But, after the principle of criminal liability of the legal person was regulated clearly in the Criminal Code A.C. 1992, the High Court of France is not only judged to punish the legal person under the law to punish the legal person directly or implicitly, but also able to judge to punish the legal person in each offense under the Criminal Code and principles regulated in the Criminal Code A.C. 1992.

Moreover, even the principle of criminal liability of the legal person as it is regulated will match with the Alter Ego Doctrine or Identification Doctrine in the Common Law System, the legislature of France shall use such principle to constitute clearly, so that the court shall punish the legal person under the correct juristic method principle of Civil Law System. The most important thing is the legislature has performed duty in regulated law whereas the judiciary is implementing the law, and then applies it to use without punishing the legal person other than the punishment required by law.

The guidance of France for the solution in criminal liability of the legal person is done by applying common law's principles to constitute in the Criminal Code of French, and it is counted as the application of different law system into the system without any contrary to the juristic method. So, it is very interesting to use it to develop legal system in Thailand. This means, Thailand's Supreme Court applied Common Law for the judgment on the legal person to take responsibility on the criminal liability without any principles or chapters from regulated law for the support. In this case, it is contrast with juristic method in Thai System which is Civil Law System as the court cannot place Judge-made law in this system as it is in the Common Law System.

Therefore, Thailand may bring the guidance which is used in France for the solution under juristic method in Civil Law System by regulated criteria that the legal person may have criminal liability as it is regulated in Section 59 of Criminal Code for the criminal liability of the natural person, including the clearly principle for crime on the legal person that may have criminal liability in order not to provide

uncertain whether when and what type of offenses that the legal person shall take responsibility, we have to try to sue the legal person in each case, and it leads to the lack of clarity. If it is considered in similar case, it can be seen that even the Court of England judged the case by placing the principle in criminal liability related to the Corporate Manslaughter” in the case of *R. v. P & O European Ferries (Dover) Ltd.* (1991), but the legislature would like to make it clear in such topic to protect health and safety of public clearly by identified that organization, which has more wider meaning than the legal person or corporation shall take responsibility on crime under the Corporate Manslaughter and Corporate Homicide Act 2007.

Moreover, the penalty on the legal person shall be defined in special case as rather than the 2 types of principle identifications in clearly criminal liability of the legal person as it is mentioned above, the principles that the legal person may commit into criminal liability and type of basement of offense that the legal person shall have as criminal liability shall be identified as special penalty on the legal person. This is because the punishment is the bad result that the court shall punish the offender for the retribution. However, the bad results are different between offender who is the legal person and the natural person. Thus, the punishment shall be different as it can be seen in France. In this case, Thailand shall consider the principle of these differences that at least the punishment in Section 18 in Criminal Code shall be increase, or the legal person who is an offender under criminal law shall be punished in the higher proportion than the natural person under the law clearly or implicitly.

In summary, the direction of problem in Thailand related to criminal liability of the legal person is not according to the juristic method of the Civil Law System. It means that Thai Court punished the legal person without considering the distinct between the provisions presented in law to punish the legal person directly or implicitly and the provision does not punish the legal person at all. It can be seen from the punishment on the legal person in each offense regulated in the Criminal Code until the punishment on the legal person on the offense in negligence presented in Supreme Decree 3446/2537. Moreover, the punishment on the legal person according to the legal person punishment’s provision implicitly still has problem as well because the

legislature has not considered about the punishment in case that the legal person is the one who has committed crime. Therefore, when the court punished the legal person, it can only fine them as the punishment.

In addition, in case that the law punished the penalty in both imprisonment and fine, the court will fine the legal person as a possible punishment as it can be seen in Supreme Decree 3446/2537 that the punishment on the legal person on the negligence that cause death to the other people under the Criminal Code Section 291 which has penalty on both imprisonment and fine, and the period of imprisonment is not more than 10 years with not more than 20,000 Baht of fine. In this case, even though the legal person was liable, the court could only fine for 20,000 Baht.

However, it can note that the juristic person's representative or the authorized person's performance on duty for his or her own benefit, such persons are liable for his or her own offence since it is now in a scope of the major duty but not include when it is proven that the juristic person takes part as a so called "contributory liability" directly or supportively. In the case, the juristic person is acknowledged and support in term of contribution or participation, the juristic person is jointly liable for the juristic person's representative or the authorized person's actions.

#### 4.4 Conclusion

Currently, the Economic System in Thailand has been changed substantially. Most of business operations are operated in a form of the juristic person such as limited company, public limited company, or limited partnership, and businesses that are operated in other forms of the juristic person. Whether, it is in a manner of business or direct business of those legal entities. Sometimes, they can act in term of business or other purposes which might cause damage to the public nuisance more than mistakes caused by general people as it is an action that has impacts on the majority, especially the legal entities that operate businesses concerning public safety, such as hotels, factories or industries, etc.

Furthermore, when there is a case, most of the victims are a large number of people and the exact cause of that case as well as a person who is responsible for that

mistake cannot be found in order to process the punishment, which examples can be seen from many cases brought to the court. Therefore, it caused massive expenses for the government to take care of those occurrences, and sometimes the loss cannot be estimated such as human life.

It is well known that crimes or actions that are against criminal law in Thailand, especially actions that cause massive accidents leading to a huge number of the loss of life and properties as well as natural resources, which happen every years and one of the causes is from the legal entities' actions, such as carelessness of the juristic person's representatives which resulting in the society to process a punishment in order to make these legal entities take responsibilities for their mistakes, in which a punishment is only for the maintenance of such rules and regulations of the society.

However, the results of guilty actions directly affect public interest. Therefore, there are always wide criticisms in the academic circle and mass media which always appear on the newspapers that whenever the juristic person is guilty for their actions and received penalties. Why those penalties do cannot recover the damage such as a fine or suspended sentence. Additionally, the penalties that use in order to stop crimes also refer to other form of operations such as order a juristic person to temporally stop the business as a threat for such guilty actions in order to prevent more crimes to occur, which it is a response according to the objectives of penalties.

Nevertheless, there is a doubt if the penalty can appropriately apply to crimes committed by the legal entities, or just to meet with criminal law or to remain the society's benefit. There are many studies mentioned that the legal entities can accept the guilt according to the criminal law including directors, the legal entities may accept criminal guilt.

Moreover, regarding to the designation of criminal culpability and penalty of the legal entities in Thailand. The people still argue that Thai legal entities have criminal culpability in every case or not, it is the penalty different from the penalty for the natural persons and how is the penalty use with the legal entities appropriate or not, and if not, how should the penalty be. These questions motivated the writer to study and compare in order to explore how penalties that are being used with the legal entities and the

natural persons are different and how should the penalty for the legal entities be, in order to bring in concepts to consider the sentence in Thailand if it is relevant to the penalty's objectives and the improvements of Thailand or not, and how. There are 2 parts in the introduction including the arguments concerning the penalties for the legal entities and the scope of criminal sentences for the legal entities.

When considering for the problems in enforcing law, it is found that the court shall punish the legal person as it is determined to punish the legal person on law which constitutes responsibility on criminal liability of the legal person clearly or punishment by law which is regulated to punish the legal person directly because the lawmaker has the power to constitute law as long as there is no contradiction or conflict with the Constitution. In this case, the punishment that is able to punish the legal person is the penalty related to property such as fine and forfeiture of property. The sample of the judgment of the Supreme Court in this type of offense is Supreme Decision No. 480/2524 which was asked to punish by the Factory Act, B.E 2512 Section 39. Also, the law that determines the criminal liability of the legal person implicitly or the offense that the law determined as a particular status of a person who takes responsibility on the criminal liability; for example, the criminal liability of "person holding mining rights", "product standard inspector" or "authorized person for transport operator," etc., and the court interpreted which it meant the legal person as it was the case that the objective of the law would like the legal person to take responsibility implicitly with the reason that if the legal person fails to perform as the law require, the legal person must be wrong which is considered to be the intention of the legislature that intended to punish the legal person with the judgment of the Supreme Court for this type of offense.

For the criminal penalty on the legal person by criminal law, If the law intends to punish the legal person, it must be clearly defined due to a policy by criminal law that it shall only punish the legal person because the concept of the person under the civil law is a person who can be the president of the right who has rights-duties. For the beginning of human nature in the criminal law, it is the beginning of "nature that shall be protected by law." Concept of the Civil Law and Criminal Law may have differences. Therefore, the liability consideration by criminal law shall not be confused

with the concept in criminal law. Finally, the law does not impose liability of the legal person by criminal law directly on person who has to take responsibility as “anyone.”

For the intentionally offense of Thailand, it shall be fixed and it can be described that the Supreme Court had judged the penalty on the legal person by using the principle from Civil and Commercial Code Section 70 that if the representative of the legal person had committed the offenses as a duty and within the limitation of the objectives of the legal person, and the legal person received benefits from such action, the court shall punish the legal person by criminal law. The action that the court punishes the legal person with 4 types of the criminal liability, it can be seen that it may be the diagnosis on the offense from the principle which is not mentioned in the criminal law with the following reasons: Firstly, the concept of a person under the civil law is a person can be president of rights. (Rechtfähigkeit) as the law allows the legal person to have rights-duties as the natural person. However, in the criminal law, there is a different idea from civil law that nature of human by criminal law is the beginning of “nature that will be protected by law” (Schutzsubjekt). Secondly, the Code of Civil Law Section 70 expressed that the presence of intention of the legal person shall appear from representatives of the legal person, which means that only the intention in civil law , but it is not in the criminal law.

Therefore, the act that the Supreme Court adopted the civil law to extend the liability of the legal person by criminal law is against the rules to consider the idea of criminal law. The Supreme Court has taken the concept of civil law to mingle with the idea of criminal law where there is no law supported in this case; unless, there is the clearly criteria laid down.

Thirdly, the Court of Thailand adopted the law on Civil and Commercial Code Section 70 to judge the legal person by criminal law as the court of Thailand tried to extent of liability by criminal law of the legal person that the legal person shall take responsibility on criminal law in general, not only take responsible on the directly tor implicitly regulated law. After, considering from the second part related to the legal provisions to punish the legal person and it can be seen clearly that legislature has intention that the legal person shall only take responsible by criminal law in the liability of the first type , but not constitute that the legal person shall be responsible for the

general liability as it can be seen from the report of the Draft of Act Prescribing Offences, B.E. 2499 that the representatives voted to cut the text of the draft in Section 3 regulated to responsible on the general criminal law. It presented that the legal person shall not have responsible on the general criminal law in Thailand's principle of law.

Nevertheless, the legal person shall responsible for each only special case by criminal law (*responsabilité spéciale*), if the court judged to punish the legal person. In this case, it shall be the interpretation offside law without any adequate support from the principle of law. Fourthly, the Supreme Court tried to place the principle on the legal person that they shall be responsible for the general criminal law by using civil law's principle for the consideration. There is not only inadequate law to support this, but there is a problem to consider for this issue as well. When the liability is considered under the criminal law, only the natural person will "take responsibility" in the "badness" part, but the legal person must not have badness or blamable action and various provisions which punish the person in accordance with their responsibilities on the liability such as age requirement, mind of the offender, etc., it cannot be apply to use with the legal person. Hence, the legal person cannot take responsibility on the criminal law in this case, and it is illegitimate when the Supreme Court punish the legal person on criminal law.

For the reasons stated above, it is disagreed that the judgment of the Supreme Court will punish the legal person with the liability in the third type as there is inadequate support by law, and when the Supreme Court judged the legal person has offense in the third liability type with the Supreme Court, Decision No. 787/2506 as the norm appeared later that the Supreme Court will have the freedom to judge by extending the responsibility on criminal law of the legal person in the third type more than before such as judged that the legal person committed an offense in case of fake document, trademark counterfeit, population fraud as well as disobeying officers under the Criminal Code and other offenses under the act on the offense related to the use of cheque which is the liability with the intention to do it.

For the offense of negligence, it shall be fixed as it can explain that if it is considered from Supreme Court, Decision No.3446/2537 whereas the Supreme Court

has a decision in respect of the penalty to punish the two accused under the Criminal Code Section 291, the extreme penalty, under the Criminal Code Section 90 on the first defendant to fine for 20,000 Baht, and the second defendant was judged to imprison with the schedule of 2 years and fine for 20,000 Baht. The imprisonment is suspended for 3 years under the Criminal Code Section 56.

However, when the court judged by expanding that the legal person can be liable for criminal negligence, there may be a problem for the consideration whether the legal person shall cause people to death by negligence in the actual nature or not. From the judgment of the Supreme Court, there are some observations on the issue of liability by criminal law of the legal person as follows: Supreme Court, Decision No. 3446/2537 was the first case that punish the legal person for an offense committed by negligence. The Supreme Court judged to punish the legal person for an offense committed by negligence which causing the death to others under the Criminal Code Section 291. This problem should be considered on how the Supreme Court has considered the negligence of the first defendant who is the legal person as the Supreme Court, Decision No. 787/2506 used as a norm diagnosed that the legal person was an offense which had done with intention, and the Supreme Court used the intention of the representative of the legal person under Civil and Commercial Code Section 70 paragraph 2 as an intention in criminal law.

It can be seen that only the natural person that can be negligence. If it is considered from the Supreme Court, Decision No. 3446/2537, the court diagnosed that first defendant who was the legal person and was negligence "...an act of first defendant (juristic company) was an act of negligence without careful that the first defendant who has a trading business and gas transportation, and this business is flammable and dangerous in the nature and circumstances of the trading owner as the first defendant, so the first defendant shall take extra care more than other owners as it should endanger to life and property of others who are not affiliated with this case ... ". The author has the opinion as it used to be mentioned that the legal person may not have the criminal liability for the offense in third type that the law regulated the word "anyone" without mentioning that the legal person shall take responsibility, or does not mention "which

status” shall take responsibility as the legislation does not have intention to punish the legal person in this case, and the consequence is the court will punish the legal person by criminal law in such case.

However, the researcher cannot deny that in some cases, the lawyers in Civil Law and Common Law Systems shall have the same idea such as the policy in criminal law that the legal person shall take responsibility on criminal liability in some cases. But, with the limitation on the juristic method of Civil Law System, even though the court judged that the legal person shall be punished in some cases, and if the court cannot punish the legal person in some cases, the legal person will not have to take responsibility on criminal liability. Nevertheless, if it is considered under the Civil Law System, the criminal policy that stipulated that in what cases of legal person shall take responsibility on criminal liability. It is the duty of the legislature to release the law to punish the legal person to protect the legal person from seeking for illegally benefits and the court has the duty to only apply the law for the facts occurred. The judgment is not a law at all. Even though, the legal person was judged to be free from taking responsibility on criminal liability, it could not achieve the actual purpose of criminal law.

When societies are more developed, trades and businesses expanded. Therefore, everyone pays attention more in corporate criminal liability and the sentences. This is because sometimes the legal entities cause damage to society and there are some penalties that can be sentenced to them. Thus, there are more and more arguments about the penalty for the legal entities in which lawyers from both Common Law and Civil Law Systems agreed that the penalty is the important measures in order to review guilt and sentence of the legal entities effectively and sufficiently. The above arguments can be divided into 2 parts; the first one is the argument about the penalties for the legal entities, which can be explained that some people believe that the penalties can be used with the legal entities must be penalties that are allowed by laws which are only a fine and forfeiture of property. In addition, if the legal entities are punished due to guilt that already mentioned in Thai Criminal Law, then it is appropriate penalty according to the

principle that; penalty must be done with a person who committed only guilt and it must be correct according to the rule of law.

Moreover, the guilt determination must be done in accordance with laws and as much as laws will allow to, which is easy for the court of law to consider whether such legal entity is guilty or not. Furthermore, if the legal entities are sentenced in other forms of penalty. There will be criticisms commenting that death penalty for the legal entities, practically means the cancellation of businesses, affects the others who did not commit such guilt such as employees or shareholders.



## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Conclusions

From the study on the application problem for tort liability of the juristic person pursuant to Thai Civil and Commercial Code, the finding indicated that there have been different aspects with contrast academic opinions. The application guideline based on different judgments has been found to be applied in some events. Then, this thesis has studied the contrast academic opinions as well as the way of relevant judgment both based on Thai law and Foreign laws. The following has been the conclusions of different aspects from the study.

The first aspect in the event of application for tort liability of the juristic person. Any laws should be applied since the finding indicated that pursuant to Civil and Commercial Law, there has not been legislation for tort liability of the juristic person peculiarly enacted. The finding indicated that pursuant to Thai Civil and Commercial Code, the legislation in the event of the juristic person's liability that the juristic person's representative or authorized officer on behalf of the juristic person causes damage pursuant to Section 76, Paragraph 1, which is the legislation in general part. In addition, the legislation pursuant to Civil and Commercial Code, Part 2 Nature of Tort which is the particular legislation in tort issue. Therefore, it has been the problem whether which way of law should be applied for the event of tort liability of the juristic person. The legislation of Civil and Commercial Code in Section 76 supplementing to Section 420 shall consider for tort liability of the juristic person in the event that the juristic person's representative or authorized officer on behalf of the juristic personas the person who causes damage. If the juristic person issue is considered and detected that juristic person may not act by itself, the activities may be done through the juristic person's representative since the juristic person is lifeless. Thus, in consideration on the principle of the juristic person's liability, the act of the juristic person's representative

or authorized officer on behalf of the juristic person, that is the person who principal person of that juristic person shall be considered. If the dutiful act of the juristic person's representative or authorized officer on behalf of the juristic person, this is the act of tort to others, the juristic person shall be liable.

The second aspect, the application of the juristic person's liability in the event of the juristic person's representative or authorized officer on behalf of the juristic person causes damage based on Section 76, Paragraph 1, the application for such juristic person's liability contains the nature of the juristic person's liability on behalf of offender by itself or the juristic person's liability based on this section, it should be the event that the juristic person involves in liability with act of the juristic person's representative or authorized officer on behalf of the juristic person.

At present, several events were found that the court has applied tort liability of the juristic person pursuant to Civil and Commercial Code in Section 76, Paragraph 1, in the nature that juristic person shall be involved in liability with the juristic person's representative in incurred damage. Thai Law has been indifferent from the national law which is the outline. When considering on the self-act of the juristic person's representative or authorized officer on behalf of the juristic person. It deemed that according to the way that the juristic person's representative or authorized officer on behalf of the juristic person acts on behalf of the company, the juristic person's representative or authorized officer on behalf of the juristic person may not intend to personally bind legal relation. Therefore, the execution of such person should be regarded as self-act of the juristic person.

The third aspect, in the event appearing that the juristic person's employee acts on duty and causes the third party damaged, the application for tort liability of the juristic person in such event should be applied pursuant to Civil and Commercial Code in Section 76, Paragraph 1, or tort liability of the juristic person should be applied in the event of the employee's liability pursuant to legislation in the nature of tort pursuant to Section 425. The author's opinion was the Committee of Amendment Consideration on Civil and Commercial Code, Part 1, described the meaning of the person who acts on behalf of the juristic person in broad meaning for closing occurred legal gap since the significant origin of the word amendment from the word of the other representatives to

be “authorized officer on behalf of the juristic person”, the main cause has been derived from the word revision in order to support the event appearing that the government officer acts for tort. As the event that the government officer is not regarded as the employee or the proxy of the administrative agencies, he or she is not in the enforcement of Section 425 and Section 427.

In addition the former event that the law stipulates the event for the act of other representatives, the problem has been existent due to the fact that the government officer is not the representative of the entire administrative agencies. Nowadays, in the event that the government officer acts for tort, The Official’s Tort Liability Act, B.E. 2539 shall be directly applied. In drafting such word, the Committee of Amendment Consideration on Civil and Commercial Code, Part 1, it should not intend for the juristic person’s liability in the event that the employee has already been the offender based on this section because such legislation has been available particularly based on Section 425 pursuant to Civil and Commercial Code of Thailand.

The fourth aspect, in the event after indemnity reimbursement by the juristic person to the third party who is damaged from the act of tort of the juristic person’s representative or authorized officer on behalf of the juristic person. The juristic person can apply the legislation based on Section 76, Paragraph 1 to exercise the right of recourse from the juristic person’s representative or authorized officer on behalf of the juristic person. When the legislation on the proxy is enforced *mutatis mutandis*, the juristic person’s representative that causes damage as enacted in Section 812 shall be liable for juristic person like the proxy’s liability toward the principal. Thus, the juristic person who has already reimbursed indemnity for damage to the victim can have right to recourse the juristic person’s representative who causes damage. For the authorized officer on behalf of the juristic person, even though Section 77 has not been enacted. It shall apply Section 4 and the legislation of the proxy for enforcement *mutatis mutandis* as well and the juristic person should not be permitted to enable to exercise its right of recourse. It was also deemed that Section 427 should not be taken for enforcement with the representative because the representative is not like the proxy, then such event may not be applied with the juristic person’s representative. Thus, the exercise for right of

recourse of the juristic person pursuant to Section 76, Paragraph 1, should be the event that juristic person can recourse the indemnity for refund from the juristic person's representative or authorized officer on behalf of the juristic person. However, the exercise for right of recourse should be applied in the event that the juristic person's representative or authorized officer on behalf of the juristic person only acts by willfulness or by serious negligence.

The fifth aspect is the application of tort liability in litigation to the juristic person. The finding indicated that at present, there have still been several events that the person who is damaged from the juristic person's act of tort intends to sue the juristic person to claim for indemnity in remedy of occurred damage.

However, the incomprehension problem on the nature of case in litigation for juristic person's liability as well as matters of law in litigation to the juristic person has been existent. The consideration of people regarding peace still needs to be considered, but it is impossible to consider people regarding only peace because the harmony between people in groups are also important in order to operate a businesses or manage properties, which affects the development of society and the country. Therefore, in the case of criminal punishment that will be appropriately applied to the legal entities in order to prevent them from taking advantage is very important as criminal punishments, according to Criminal Code Act/Section 18, the objective to punish a person more than a legal entity. The condition of guilt and the punishment was only a fine and a forfeiture of property, which many people in society criticized that such punishment cannot help to compensate damages or losses and it does not effectively to stop the legal entities from committing crimes when compared with laws in the other countries.

The objective of the punishment for the natural persons and legal entities are different according to the condition of psychological and cherished property, which indicate the objective of punishment differently and affect the form of punishment for each person differently as well. Criminal punishment is the original punishment that might not be enough to use with the legal entities and make it satisfactory effective, resulting in more crimes. However, even though Thailand does not have much of the provision of law decisively regarding to the criminal punishment of the legal entities, but such

problem should be fixed according to the situation in the world, which depends on the form of guilt of the legal entity toward to the legal entity's representatives.

According to, the consideration of fairness issue in assigning a presumption of law. It reveals that the US law is the Common Law System and the case that the US has the law which assume the suspect takes criminal liability, such law is not against the constitution as the Supreme Court has set that if such presumption is possible, such provision of law is not against the constitution. In addition, the Common Law System was separate burden of proof in to 2 topics including evidential burden and persuasive burden, and if the burden of proof is pushed off, such law will not affect the principle of law that "to first assume that the suspect is innocent". Therefore, the presumption of directors is not against the constitution.

It can be seen that many countries which are under the Common Law System agreed that the directors of the legal entities can take criminal liability especially in England. Even though, there is no problem about the presumption of the legal entities to firstly take criminal liability that are against the constitution, there is still unfairness, the court usually judges as it is the suspects' burden to prove themselves if they are innocent. Later, the establishment of the legal entity for business operation has become general issue, which if base on the original principle that legal entity's representative must take criminal liability. While, the legal entity itself does not have to take criminal liability and the authority who manages such legal entity is not the representative also does not have to take criminal liability. Resulting, in the case that the directors who are not legal entity's representative persuaded the legal entity's representative to commit crime in order to take advantages for themselves.

In the United States, the law system accepts that the legal entities can commit crime and can take criminal liability. It is the combination of the concept of British Criminal Liability and Respondent Superior, the legal entities shall take criminal liability if its employees or staffs commit crime under the scope of work and on behalf of such legal entity, or act with the intention to gain benefits for such legal entity, even though that the legal entity did not receive such benefits and no matter what position the employee is in, as a matter of fact, the legal entity management is complicated and

there are always authority transfers in order to create work flow and any decision makings are not only from the authorities and representatives. As the Supreme Court imposed the principle that the presumption resulting in carrying forward the burden of proof to the suspect is not against the constitution. If, it appears that the presumption is possible, which is in the case that the presumption mentions that the legal entity's directors should take criminal liability, it means that it is possible which those directors have committed crime as well.

Moreover, from the research, the US law usually does not impose the presumption that allows legal entity's directors to take criminal liability superfluously in comparison to Thai Law. In addition, there is a remark that this kind of guilt allows the directors to take criminal liability as "witness" only, not "commit". Thus, it can be seen that both British Law and US Law will not push the burden of proof to legal entity's directors even they can impose such law without going against the constitution or the principle "first assume that the suspect is innocent". Nowadays, in England, there is no such imposed law anymore. Besides, British Law and US Law imposed the presumption rule that the directors must take criminal liability when they "witness" and, although without "commit".

For the problem in criminal liability of the legal person in Thailand, there is not only a problem on application of law of Supreme Court, but it also has another problem on the lack of policy and clear guidance on legislation. It means that the legal person may have to take responsibility in respect of the offenses set in the legal provision if it is considered from law related to criminal liability, except the case that the law is regulated that the legal person shall take responsibility on crime clearly, it can be found that such constitution is lack on the clear guidance in law constitution. It means that in case that the law determined, there are 2 types of the legal provisions that the legal person shall commit crime implicitly as follows: 1) In the traditional form that the legal person has to commit the crime implicitly identified the person who had to take responsibility on crime by defining "status" as the person may be natural person or legal person, but at least it still have advantage as it can be interpreted that the legislature has

intention to punish anyone who has the status as it is mentioned. The regulation on punishment has the following problems:

1) For the case that the legal person shall commit crime implicitly, the legislature regulated “status” of the person who shall take responsible whether he can be natural person or legal person. However, in the punishment section, it has not been regulated on the nature of offender whether he is natural person or legal person.

2) For the case that law does not regulate which the legal person shall take responsible on crime clearly or implicitly as it may be when the law was regulated, it does not consider those offenses are focused to punish the legal person. Therefore, the legislature shall consider what kind of offenses that the legal person shall take responsibility on it, and it shall be clearly defined in order not to cause problem by misinterpreted as in the present. Finally, when the provisions are regulated and types of offenses that the legal person shall take responsibility are defined. So, the punishment on the legal person shall be set directly and bad results shall be considered as well. Upon the fines, other punishments which cause bad results for the legal person may be defined to meet the need on the purpose to apply the punishment related to deterrence (Retributive) as it is defined in the Law of Republic of French.

In conclusion, lawyers from both the Civil Law and Common Law agreed that legal entities should take criminal liability and should be punished by criminal punishment if such legal entity committed crime because of the operation of their businesses. Furthermore, the industrial business has expanded, therefore the legal entities have become powerful organizations that influence economic system and society. It is agreed that there should criminal punishment for the legal entities in order to control business operations, which is the criminal policy. There should a discussion about the punishment that will be used with the legal entities in order to find the most appropriate punishment because the existed allow only fining and forfeiting the property. Moreover, the theory and the objective of punishment which were established for such a long time, it was set for the purpose of using with the natural persons more than the legal entities. However, when society and economy have been developed, and

there are more investment including domestic and international. Therefore, it causes carelessness in business operation, or it might cause from business competition which leading to crime and affects society and public.

As a result, the government get involved in order to find solution, which leads to the occurrence of making the legal entities to take criminal liability. The countries in the Common Law and Civil Law Systems including Thailand assigned the legal entities to take criminal liability as same as the natural persons; the legal entities can have criminal guilt in any kind and the court will consider regarding the condition of the legal entities, the objective of punishment and damage that the legal entities received by referencing on and is on the fundamental of the objective of punishment.

## 5.2 Recommendations

From the study of the issue of the scope of criminal punishment for the legal entity including studies in Thailand and in other countries, and including both countries in the Common Law and Civil Law Systems. It reveals that Thailand applied the form of guilt and criminal punishment for the natural persons to use with the legal entities, by adjusting an original punishment according to the existed criminal law to sue with the legal entities and imposed them to take criminal liability in a broad area.

However, such application does not contain clearness and does not relevant to the objective of punishment because the suspect or the convict is in different conditions. The use of criminal punishment that was set for the natural persons to apply and use with the legal entities will not meet with the objective. Even though, Thai lawyers agreed that the legal entities should receive the appropriate punishment and different than the punishment for the natural persons. It cannot be done appropriately due to the lack of criterions and it is not relevant to the objective of punishment.

From the study on application problem for tort liability of the juristic person pursuant to Civil and Commercial Code of Thailand, the finding still indicated the application problem for tort liability of the juristic person in several aspects. The application for liability of the juristic person in different natures may result in improper

nature for act of law. Then, the auditor would like to suggest the application guideline for tort liability of the juristic person as follows.

1. According to, the application of legislation in the event that the juristic person's representative or authorized officer on behalf of the juristic person causes damage, the legislation based on Civil and Commercial Code in Section 76, Paragraph 1 supplementing to the tort liability should be applied. However, since only legislation in Section 76, Paragraph 1 is not the legislation for tort liability of the juristic person, but it is the legislation in part of the juristic person's liability from the act of the juristic person's representative or authorized officer on behalf of the juristic person.

2. The application for tort liability of the juristic person from the act of the juristic person's representative or authorized officer on behalf of the juristic person should be applied in the way that "the juristic person shall be liable for incurred damage." The court should not apply or use the word in the way that "the juristic person and the representative shall be mutually liable" since it may cause misunderstanding on the nature of the juristic person's liability.

3. In the event of the act occurred from the employee of the juristic person, the court should apply the liability for act of tort of the juristic person in the nature of tort liability from the act of others pursuant to Section 425 due to existent specific legislation in such issue.

4. In case that the juristic person's right of recourse from the juristic person's representative or authorized officer on behalf of the juristic person as exercise pursuant to Section 76, Paragraph 1, the right should be granted to the juristic person in exercise of right of recourse with the juristic person's representative or authorized officer on behalf of the juristic person afterward pursuant to this section. Even though, such act of tort of the juristic person's representative or authorized officer on behalf of the juristic person will be regarded as the act of the juristic person but the relationship between the juristic person and the juristic person's representative or authorized officer on behalf of the juristic person has still be liable among each other.

However, the application in the event of right of recourse pursuant to Section 76, Paragraph 1 should be specific in the even that the juristic person's representative

or authorized officer on behalf of the juristic person is the only actor by willfulness and by serious negligence, the act in duty of the juristic person's representative or authorized officer on behalf of the juristic person as the act for benefit of the juristic person. In operation, some mistakes may occur and if the right is granted to the juristic person to enable for exercise the right of recourse the juristic person's representative or authorized officer on behalf of the juristic person to reimburse indemnity for refund to juristic person for all events. It implies that all the time that such juristic person is the juristic person in accordance with law, the juristic person shall not be liable for any damages incurred since the reimbursement of indemnity can exercise the right of recourse for refund from the juristic person's representative or authorized officer on behalf of the juristic person for all events.

Therefore, the author would like to propose to add the statement that "if the act is done by willfulness or by serious negligence" at the end of Section 76, Paragraph 1, for more fairness and clarity in legal application. From suggestion on statement addition proposed by the author, Section 76 of Civil and Commercial Code should be revised as follows.

5. For litigation to the juristic person, the plaintiff should sue the juristic person by suing the juristic person and the juristic person's representative in the same case for benefit in proof on act of tort of the juristic person's representative or authorized officer on behalf of the juristic person for the act based on duty. However, in the event that the act of the juristic person's representative or authorized officer on behalf of the juristic personas not clearly appeared. The plaintiff should only sue the juristic person without requirement for suing the juristic person's representative or authorized officer on behalf of the juristic person into the case since it will be useful in the event of adduction pursuant to Civil Procedure Code.

In addition, in the litigation for tort liability of the juristic person, the plaintiff should give the precedence to the basic principle of tort liability. The plaintiff should primarily consider on the incurred damage whether it is the act that violates the legislation in the way of tort which is the absolute assumption without requirement for proof of fault. If it is the liability in such nature, the case in litigation shall be set in

writing the plaint and proceeding is executed in the way of tort liability based on such fault basis since it will make action on the case of the plaintiff very useful in the case such as tort liability pursuant to Section 425, 434, 436 and Section 437. In drafting the plaint for proceeding on tort liability of that juristic person, what should be highly emphasized by the plaintiff for another aspect has been the averment for tort liability of the juristic person that the plaintiff shall be executed based on Civil Procedure Code pursuant to Section 172 by the way that the plaintiff shall do the overt averment on the nature of allegation. The averment shall be complete according to the element of tort liability and element for the event of liability of the juristic person that the juristic person's representative or authorized officer on behalf of the juristic person causes damage in order to avoid the obscure action of the plaintiff that will be the cause for dismissal sentence by the court.

Therefore, for the establishment of punishment for the legal entities, the punishment should be set clearly that it can be used with the legal entities, which separate from the natural persons. That is to say, the cancellation of business, the high rate of fine, the cancellation of certificates, the prohibition of auction or funding from public company, or the prohibition of issuing cheque, etc. as mentioned in chapter 3. All are punishment that can be appropriately used with the legal entities. In addition, the other measures can be used as well as behavior probation, safety policy, public service, or apply govern and civil measure together with criminal measure as same as the other countries.

The conditions of the criminal charges against the juristic person can be defined under the Penal Code, Section 59/1 para 1 by "persons who perform accordingly as major parts or authority of the juristic person can be initiated from the major performance of the juristic person" to describe that if persons on that position and status are not capable to perform tasks, the major duty of the juristic person may not be achieved. In consequence, the persons who are capable to perform duty as the essential part required by operation and authority of the juristic person, it is considered as "the authorized person who acts on behalf of the juristic person". This takes the juristic person's liability into accounts. And Section 59/1 para 2 "the juristic person is liable for

the juristic person representative's actions of which "the juristic person's representative" is defined and the criteria of involvement with the juristic person as in a status "the juristic person's representative", Section 59/1 para 3 "the juristic person is liable for the authorized officer's actions on behalf of the juristic person of which "the authorized officer's actions on behalf of the juristic person" and Section 59/1 para 4 according to para 1,2,3 "the authorized person and acts on behalf of the juristic person" which will provide the juristic person's liability for actions of "the authorized person who acts on behalf of the juristic person" who is not "the juristic person's representative" and "the juristic person's representative acting on behalf of the juristic person is the person who expresses and does any actions on behalf of the juristic person" and the statuses of representative are determined as the big position and able to perform in its behalf of the juristic person in each organization that requires proper interpretation in order to restrict the meaningful word of "the authorized person who acts on behalf of the juristic person" and "the representative who acts on behalf of the juristic person" In the status, some person has the big position in the corporate but he or she may not be the representative" for the common ground of the juristic person's liability in term of the Primary liability.

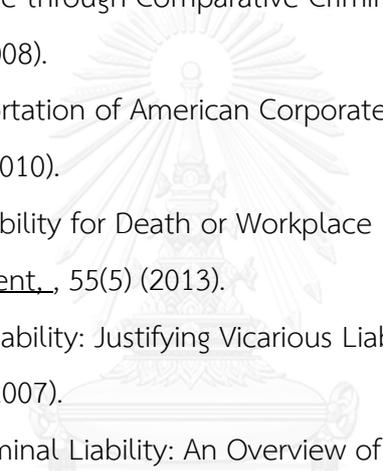
For criminal penalties of the juristic person that shall be set as a rule of law and at will be legislated as well as adapted by considering the punishments in French Criminal Code Article 131 – 138 under Criminal Code, Section 18/1 such as dissolution, operation prohibition or revocation of licenses, detention, cessation, exclusion from public bidding, prohibition on public fundraising, prohibition on the uses of cheque or credit cards, fine, confiscation, victim notification or pay compensation by the juristic person.

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APPENDIX

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